

THE APPENDICES ARE PART OF THE DBE PROGRAM. THE APPENDICES MAY BE SUBJECT TO REVISION, SUBSTITUTION, DELETION OR ADDITION BY THE OFFICE OF CIVIL RIGHTS WITHOUT BOARD REVISION OF THE CORE DBE PROGRAM OR APPROVAL OF CHANGES.

## **Appendix A: Definition of Terms**

1. Affiliates. Firms are affiliates of each other when, either directly or indirectly: (1) one firm controls or has the power to control the other, or (2) a third party or parties controls or has the power to control both firms, or (3) an identity of interest between or among parties exists such that affiliation may be found. See Small Business Administration (SBA) regulations, 13 CFR Part 21; 13 CFR Section 121.401.
2. Agreement. An agreement between BART and a Consultant for services.
3. Alaska Native. A citizen of the United States who is a person of one-fourth degree or more Alaskan Indian (including Tsimshian Indians not enrolled in the Metlaktla Indian community), Eskimo, or Aleut blood, or a combination of those bloodlines. The term includes, in the absence of proof of a minimum blood quantum, any citizen whom a Native village or Native group regards as an Alaska Native if their father or mother is regarded as an Alaska Native.
4. Alaska Native Corporation (ANC). Any Regional Corporation, Village Corporation, Urban Corporation, or Group Corporation organized under the laws of the State of Alaska in accordance with the Alaska Native Claims Settlement Act, as amended (43 U.S.C. 1601, et seq.).
5. Appeal. A formal filing with U.S. DOT by a firm, which has been denied certification by the District as a Disadvantaged Business Enterprise.
6. Assets. All the property of a person available for paying debts or for distribution, including one's respective share of jointly held assets. This includes, but is not limited to, cash on hand and in banks, savings accounts, IRA or other retirement accounts, accounts receivable, life insurance, stocks and bonds, real estate, and personal property.
7. Bid. A proposal or offer by a Bidder for a construction or procurement contract when completed and submitted on the prescribed Bid Form.
8. Bidder. Any individual, firm, partnership, joint venture, corporation, or combination thereof (collectively "firm"), submitting a Bid or Proposal for a contract or services agreement, acting directly or through a duly authorized representative.

9. Business, Business Concern, or Business Enterprise. An entity organized for profit with a place of business located in the United States, and which operates primarily within the United States or which makes a significant contribution to the United States economy through payment of taxes or use of American products, materials, or labor.
10. Challenge. A written complaint filed with the District by a person alleging that a currently certified firm is ineligible.
11. Consultant. A firm that has entered into an Agreement with BART.
12. Contingent Liability. A liability that depends on the occurrence of a future and uncertain event. This includes, but is not limited to, guaranty for debts owed by the applicant concern, legal claims and judgments, and provisions for federal income tax.
13. Contract. Collectively means Prime Construction Contracts, Subcontracts, and Procurement Contracts.
14. Contractor. A Prime Construction Contractor awarded a construction contract by BART.
15. Commercially Useful Function. A DBE, SBE or MSBE performs a commercially useful function when it is responsible for execution of the work of the contract and is carrying out its responsibilities by actually performing, managing, and supervising the work involved. To perform a commercially useful function, the DBE must also be responsible, with respect to materials and supplies used on the contract, for negotiating prices, determining quality and quantity, ordering the material, and installing and paying for the material itself. To determine whether a DBE is performing a commercially useful function, the amount of work subcontracted, industry practices, whether the amount the firm is to be paid under the contract is commensurate with the work it is actually performing and the DBE, SBE or MSBE credit claimed for its performance of the work, and other relevant factors must be evaluated.

A DBE, SBE or MSBE does not perform a commercial useful function if its role in the contract is limited to that of an extra participant through which funds are passed in order to obtain the appearance of DBE participation. If the DBE, SBE or MSBE does not perform or exercise responsibility for at least 51 % of the total cost of its contract with its own work force, or the DBE, SBE or MSBE subcontracts a greater portion of the work of a contract than would be expected on the basis of normal industry practice for the type of work involved, the DBE, SBE or MSBE is presumed not to be performing a commercial useful function.

16. Days. Refers to calendar days. In computing any period of time described in this part, the day from which the period begins to run is not counted, and when the last

day of the period is a Saturday, Sunday, or Federal holiday, the period extends to the next day that is not a Saturday, Sunday, or Federal holiday. Similarly, in circumstances where the recipient's offices are closed for all or part of the last day, the period extends to the next day on which the agency is open.

17. Disadvantaged Business Enterprise (DBE). A for-profit small business concern:
  1. Which is at least 51 percent owned by one or more socially and economically disadvantaged individuals or, in the case of any publicly owned business, in which at least 51 percent of the stock is owned by one or more socially and economically disadvantaged individuals; and
  2. Whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it.
18. Disparity Study. The Disparity Study (the Study) is to support the District's DBE Program administered in accordance with the requirements of 49 CFR Part 26. The Study determine whether or to what extent disparities exist in BART's DBE utilization in the contracting industry relevant to BART contracting activities in the BART market area.
19. District. The San Francisco Bay Area Rapid Transit District.
20. DOT. The U.S. Department of Transportation.
21. Federally Funded Contract. Any contract or modification of a contract between the District and a Contractor that is paid for in whole or in part with funds from the Department of Transportation.
22. Federal Transit Administration (FTA). An agency of the U.S. Department of Transportation.
23. First Tier Subcontract. A contract between a Prime Contractor and First Tier Subcontractor.
24. First Tier Subcontractor. A firm that has been awarded a First Tier Contract by a Prime Contractor or a Supplier.
25. Goal. A numerically expressed objective.
26. Good Faith Efforts. As more fully explained in 49 CFR Part 26 (Appendix A) and in Appendix F of the District's DBE Program, good faith efforts consist of all those necessary and reasonable steps to achieve a DBE goal or other requirement which by their scope, intensity, and appropriateness to the objective could reasonably be expected to obtain sufficient DBE participation even if they were not fully successful.
27. Home State. The state where a DBE firm maintains its primary offices.

28. Immediate Family Member. Refers to father, mother, husband, wife, son, daughter, brother, sister, grandfather, grandmother, father-in-law, mother-in-law, sister-in-law, brother-in-law, and domestic partner and civil unions recognized under State law.
29. Indian Tribe. Any Indian tribe, band, nation, or other organized group or community of Indians, including any ANC, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians, or is recognized as such by the State in which the tribe, band, nation, group, or community resides.
30. Joint Venture. An association of a DBE firm and one or more other firms to carry out a single, for profit business enterprise, for which purpose the parties combine their property, capital, efforts, skills, and knowledge, and in which the DBE is responsible for a distinct, clearly defined portion of the work of the contract and whose share in the capital contribution, control, management, risks, and profits of the joint venture are commensurate with its ownership interest.
31. Liabilities. Financial or pecuniary obligations. This includes, but is not limited to, accounts payable, notes payable to bank or others, installment accounts, mortgages on real estate, and unpaid taxes.
32. Lower-Tier Subcontractor. Any Subcontractor that is below the first-tier level. This could include 2<sup>nd</sup> or 3<sup>rd</sup>-Tier Subcontractors, etc.
33. Manufacturer. A business that operates or maintains a factory or establishment that produces on the premises the materials or supplies obtained by the Contractor.
34. Matchmaking. Outreach events hosted by the District where Prime contractors are paired with potential subcontractors in one-on-one meetings.
35. Micro Small Business Entity (MSBE) – An SBE firm certified by BART as an MSBE in a single industry classification which is the firm's primary industry classification, whose average annual gross receipts (including those of its affiliates) over the previous three fiscal years do not exceed the following caps: i) \$10 million for firms whose primary industry classification is construction; ii) \$6 million for firms whose primary industry classification is professional services; or iii) \$6 million for firms whose primary industry classification is the procurement of goods.
36. Native Hawaiian. Any individual whose ancestors were natives, prior to 1778, of the area, which now comprises the State of Hawaii.
37. Native Hawaiian Organization. Any community service organization serving Native Hawaiians in the State of Hawaii, which is a not-for-profit organization, chartered by the State of Hawaii, is controlled by Native Hawaiians, and whose business activities will principally benefit such Native Hawaiians.

38. Non-Compliance. The condition existing when a contractor has failed to implement or meet the requirements of 49 CFR Part 26, the District's DBE Program, the District's policies and procedures pertaining to DBE participation, or any rules or regulations implementing any of the above.
39. Personal Net Worth. The net value of the assets of an individual remaining after total liabilities are deducted. An individual's personal net worth does not include the individual's ownership interest in an applicant or participating DBE, SBE or MSBE firm or the individual's equity in his or her primary place of residence. An individual's personal net worth includes only his or her own share of assets held jointly or as community property with the individual's spouse.
40. Pre-Bid or Pre-Proposal Conference. A meeting held by the District, prior to the bid opening or proposal submittal date of a particular contract at which prospective bidders or proposers are advised of the District's DBE Program.
41. Pre-Construction Conference. A meeting held by the District after award of contract on a particular construction project, but prior to the commencement of any work, at which the Prime Contractor is advised of its compliance obligations including DBE, EEO, and labor standards requirements, and any final technical requirements.
42. Primary industry classification. The North American Industry Classification System (NAICS) code, which best describes the primary business of a firm. The NAICS is described in the North American Industry Classification Manual—United States, which is available on the Internet at the U.S. Census Bureau Web site: <http://www.census.gov/eos/www/naics/>
43. Prime Construction Contract. A construction contract between BART and a Prime Contractor.
44. Prime Construction Contractor. A firm that has been awarded a Prime Construction Contract by BART
45. Principal Place of Business. Refers to the business location where the individuals who manage the firm's day-to-day operations spend most working hours. If the offices from which management is directed and where the business records are kept are in different locations, the recipient will determine the principal place of business.
46. Procurement Contract. A contract between BART and a Supplier.
47. Proposal. The offer of the Proposer for the Services Agreement, in response to BART's request when completed and submitted on the prescribed Proposal Form.
48. Race-Conscious. A measure or program that is specifically focused on assisting only DBEs, including women-owned DBEs.

49. Race-Neutral. A measure or program that is or can be used to assist all small businesses. For the purposes of this Program, race-neutral includes gender neutrality.
50. Regular Dealer. A firm that owns, operates, or maintains a store, warehouse or other establishment in which the materials or supplies required for the performance of a contract are bought, kept in stock, and are regularly sold to the public in the usual course of business. To be a regular dealer, the firm must engage in, as its principal business and in its own name, the purchase and sale or lease of the products in question. A regular dealer in such bulk items as steel, cement, gravel, stone and petroleum products need not keep such products in stock, if it owns or operates distribution equipment for the products.
51. SBA. U.S. Small Business Administration.
52. Second-Tier Subcontractor. a firm that has been awarded a Subcontract by a First-Tier Subcontractor.
53. Small Business Concern. A small business concern is an existing small business, as defined by Section 3 of the Small Business Act and the Small Business Administration regulations implementing it (13 CFR Part 121), whose average annual gross receipts (including those of its affiliates) for the previous three fiscal years does not exceed \$23.98 million (or as adjusted for inflation by the Secretary of DOT) pursuant to 49 CFR Section 26.65(b).
54. Small Business Entity (SBE). A small business defined as follows:
1. A small business concern;
  2. Which is at least 51% owned and controlled by one or more individuals, or in the case of any publically owned business, in which at least 51% of the stock is owned by one or more individuals whose personal net worth does not exceed \$1.32 million; and
  3. Whose management and daily business operations are controlled by one or more of the individuals whose personal net worth is as described in 2. above.
  4. Firms certified as a DBE by the CUCP are presumed to have met requirements of subsections 1., 2., and 3. above.
55. Socially and Economically Disadvantaged Criteria. Criteria based on 49 CFR Part 26 (Appendix E) which the District applies on a case-by-case basis to applicants for DBE status who are not members of a racial, ethnic or gender group presumed to be socially and economically disadvantaged. A determination of social disadvantage should be made before proceeding to making a determination of economic disadvantage.
56. Subconsultant. A firm that has entered into a subcontract with a Consultant.
57. Subcontract. A Contract entered into between a Contractor, Supplier, or Consultant

with a Subcontractor, Subsupplier, or Subconsultant, respectively.

58. Subrecipient. A recipient of DOT or other federal funded assistance which has received these funds from the District.
59. Subsupplier. A firm that has entered into a Contract with a Supplier to provide supplies to the Supplier.
60. Supplier. A firm that has been awarded a Procurement Contract by BART or who provides supplies and/or materials to a Prime Construction Contractor or Contractor.
61. Transit Vehicle Manufacturer. Any manufacturer whose primary business purpose is to manufacture vehicles specifically built for public mass transportation. Such vehicles include, but are not limited to: Buses, rail cars, trolleys, ferries, and vehicles manufactured specifically for paratransit purposes. Producers of vehicles that receive post-production alterations or retrofitting to be used for public transportation purposes (e.g., so-called cutaway vehicles, vans customized for service to people with disabilities) are also considered transit vehicle manufacturers. Businesses that manufacture, mass-produce, or distribute vehicles solely for personal use and for sale “off the lot” are not considered transit vehicle manufacturers.



## **Appendix B: Procedures for Determining, Achieving and Counting the Triennial Goal**

Pursuant to 49 CFR Section 26.45, the Office of Civil Rights will establish a triennial DBE goal (“Triennial Goal”) according to the procedures set forth herein, subject to the approval of the Board of Directors, for the participation of DBEs in all projected contracts utilizing DOT financial assistance for a period covering three fiscal years. The Triennial Goal will be expressed as a percentage of the total amount of DOT funds the District anticipates expending in three(3) year period covered by the Triennial Goal, excluding any funds allocated for the procurement of transit vehicles. A report outlining the steps and calculations used to establish the District’s Triennial Goal (“Triennial Goal Report”) will be submitted to the appropriate operating administration for review no later than October 31 for each three fiscal year period to be covered by the Triennial Goal.

Should the awards and commitments shown on the District’s Uniform Report of Awards or Commitments and Payments at the end of any fiscal year be less than the overall goal applicable to that fiscal year the District shall analyze in detail the reasons for the difference between the overall goal and the awards and commitments in that fiscal year, establish specific steps and milestones to correct the problems identified in the analysis which will enable the District to meet fully its goal for the new fiscal year.

The Liaison Officer will track and evaluate the Triennial Goal on a quarterly basis. This tracking is to ensure that the District is meeting the largest feasible portion of the Triennial Goal through race-neutral means.

In the event that the District amends its triennial goal it shall be submitted to the appropriate operating authority in a manner consistent with 49 CFR Section 26.45.

The District's overall goal is reflective of the amount of ready, willing and able DBEs that are available to participate in contracting opportunities and is reflective of the amount of DBE participation the District would expect absent the effects of discrimination. The District intends to meet this goal, to the fullest extent feasible, through the race-neutral measures. Where race-neutral measures are inadequate to meet the annual overall goal, the District will establish contract-specific goals for particular projects with subcontracting opportunities. Contract-specific goals will be established in a manner consistent with the disparity findings District’s Availability and Utilization Study (“Disparity Study”), or any subsequent updates to the Disparity Study. Overall project goals may be set for design-build, turnkey and/or multi-year projects consistent with the requirements of 49 CFR Part 26.

The Office of Civil Rights will use the following procedures for establishing the DBE Triennial Goal:

### **A. Projecting Federally Funded Contract Expenditures**

In conjunction with the preparation and adoption of the budget for each fiscal year, the Liaison Officer, in consultation with the appropriate District departments responsible for contracting activities, will conduct a thorough analysis of the projected number, types of

work and dollar amounts of contracting opportunities that will be funded, in whole or in part, by DOT financial assistance for the upcoming three fiscal year period (“Triennial Period”). FTA assistance used in transit vehicle procurements is not included in the base amount from which the triennial goal is calculated.

## **B. Establishing a Base Figure**

Pursuant to 49 CFR Section 26.45, the District will develop a base figure to express the availability of DBEs as a percentage of all contractors, subcontractors, manufacturers and suppliers in the relevant contracting markets. The District will follow one of the methodologies provided in 49 CFR Part 26, but reserves the right to choose an alternative methodology and provide the appropriate documentation in the Triennial Goal Report described in Section F of this Appendix B. Generally, the District expects to use the same data source in establishing the base figure for both all available businesses and available DBE firms.

1. The Liaison Officer, in conjunction with the appropriate District departments, will conduct a thorough analysis of the relevant contracting markets in which the District may solicit participation from contractors, subcontractors, manufacturers and suppliers for the Triennial Period. This analysis will include the relevant geographic market for the types of work to be contracted, the relevant North American Industry Classification System (NAICS) codes for the types of work to be contracted and any other indicators that the District determines to be relevant to defining its contracting markets for the Triennial Period. The Liaison Officer will then determine the total number of available businesses for the relevant contracting markets. The Liaison Officer will consult a variety of sources, which may include, but are not limited to, the County Business Patterns Database, Census Bureau data, appropriate private business databases, and relevant disparity studies.
2. The Liaison Officer will conduct a similar analysis to determine the number of DBEs that are available to participate as contractors, subcontractors, manufacturers and suppliers in the projected contracts for the fiscal year. This analysis will include the relevant geographic market for the types of work to be contracted, the relevant NAICS codes for the types of work to be contracted, and any other factors as described above. The District will consult a variety of sources, which may include, but are not limited to, the County Business Patterns Database, the Minority Business Patterns Database, Census Bureau data, appropriate private databases and relevant disparity studies.
3. The Liaison Officer will compare the number of available DBEs in the relevant contracting markets for the Triennial Period to the total number of available businesses in the relevant contracting markets for the Triennial Period. The calculation will include a weighting factor according to the contract expenditure patterns.

### **C. Adjusting the Base Figure**

Pursuant to 49 CFR Section 26.45(d), the District will adjust the base figure based on demonstrable evidence indicating that the availability of DBEs for federally funded contracts for the specific Triennial Period may be higher or lower than the base figure indicates. At a minimum, the Liaison Officer will analyze the current capacity of DBEs and evidence from disparity studies conducted anywhere within the market area. The Liaison Officer may also consider evidence from related fields that affect the opportunities for DBEs to form, grow and compete, such as data on employment, education and training, statistical disparities in the ability of DBEs to obtain financing, bonding and insurance and the effects of past discrimination.

Based on the evaluation of the above factors, evaluation of data (if any) regarding over-concentration, and other necessary adjustments (including regulatory and contract-specific considerations, e.g., duration of individual projects), a goal will be set at the level of DBE participation expected absent the effects of discrimination.

A description of the methodology used to establish the triennial goal, including the base figure and the evidence with which it was calculated and the adjustments made to the base figure and the evidence relied on for the adjustments will be included with the overall Triennial Goal submission to DOT. The submission will also include the District's projection of the portions of the annual goal that will be met through race-neutral and race-conscious measures.

### **D. Projection of Percentage of Overall Goal to be Achieved Through Race-Neutral and Race-Conscious Measures**

Once the Triennial Goal is proposed, the Liaison Officer will analyze and project the maximum feasible portion of that goal that can be achieved by using race-neutral methods. Where the projected portion of the goal to be met using race-neutral methods is less than the annual overall goal, the remaining portion will be achieved by establishing contract goals for particular projects that have subcontracting opportunities, in accordance with the findings of the District's Disparity Study. With prior FTA approval, the use of race-conscious contract goals may be varied where there is an overconcentration of DBEs in a particular trade.

The District intends to use race-neutral methods to the maximum extent feasible to achieve its Triennial Goal. DBE participation that is obtained on contracts that have no specific DBE goal, or where Prime Contractors are DBEs, or where Prime Contractors use a strictly competitive bidding process or do not consider the DBE's status as a DBE in awarding a subcontract, will be considered race-neutral DBE measures.

The Liaison Officer will review and analyze the adjusted goal figure to determine the amount of the annual goal that can be met through race-neutral measures and the type(s) of contracts to be selected. The District will review that portion of the annual DBE goal being met through race-neutral measures three (3) months after submission of the annual goal and on a quarterly basis thereafter and may adjust the use of contract-specific goals accordingly. As part of the review, the District will verify compliance with the DBE Program and DBE goal attainment.

As described below in Section E of this Appendix B, the Liaison Officer will monitor and

adjust the use of contract-specific goals in accordance with 49 CFR Section 26.51(f). Contract goals will be used only on those federally-funded contracts that have subcontracting opportunities and where the findings of the District's Disparity Study permit the use of contract-specific goals. DBE contract goals will be established so as to cumulatively result in meeting that portion of the District's overall goal that is not projected to be met through race-neutral means.

#### **E. Adjustment of Contract Goals**

Pursuant to 49 CFR Section 26.51(f), the District will monitor the use of contract goals to ensure that the Program continues to be narrowly tailored.

1. If the Triennial Goal Report indicates that the District can meet its entire overall annual goal for any given Triennial Period through race-neutral means, the District will implement its Program without setting contract goals during that year.
2. If during the course of the Triennial Period the District is using contract goals and determines that it will exceed its overall Triennial goal, the District will reduce or eliminate the use of contract goals to the extent necessary to ensure that the use of contract goals does not result in exceeding the Triennial Goal. If the District determines that it will fall short of the Triennial Goal, the District will make appropriate modifications in the use of race-neutral and race-conscious goals in order to meet the overall goal.
3. If the District meets or exceeds its Triennial Goals for two (2) consecutive triennial Periods, using only race-neutral means, the District will not set contract goals on any contracts in the next Triennial Period. The District will continue using only race-neutral means to meet its overall annual goals unless and until it does not meet its overall annual goal for a Triennial Period.
4. If the District's DBE participation exceeds the Triennial Goal in two (2) consecutive years through the use of contract goals, the District will reduce the use of contract goals proportionately in the following Triennial Period.

#### **F. Adopting and Publishing the Overall DBE Goal**

Upon completion of the analysis described above, the Liaison Officer will prepare a Triennial Goal Report. The Triennial Goal Report will document the analysis and methodology as well as the proposed goal and estimate to be achieved through race-neutral measures.

1. Pursuant to 49 CFR Section 26.45(g), the District will publish the proposed Triennial Goal and rationale in general circulation and DBE-oriented media. The notice will include a statement that the proposed Triennial Goal and its rationale are available for inspection by the public for 30 days from the date of publication. The notice will also include a statement that the District will accept public comments to the proposed Triennial Goal and rationale for a period of 45 days from the date of publication and provide instructions for the submission of comments.

The District shall identify and consult with minority, women's, general contractor

and community organizations which could be expected to have information concerning the availability of disadvantaged and non-disadvantaged businesses, the effects of discrimination on opportunities for DBEs, and the District's efforts to establish a level playing field for the participation of DBEs. As part of this consultation, the District will schedule a direct interactive meeting with as many interested stakeholders as possible, focusing on obtaining information relevant to the goal setting process. The District will document the consultation process in the Triennial Goal Report and, if necessary, adjust the proposed Triennial Goal. Upon the completion of public participation, the Liaison Officer will prepare a summary report analyzing the public comments received, if any, to the General Manager.

2. The Triennial Goal Report will be furnished to the General Manager. Following the review of the Triennial Goal Report, the General Manager will approve a Triennial Goal for DBE participation, which will include a projection of the portion of that goal that can be achieved through race-neutral and race-conscious measures. Unless otherwise directed, the Triennial Goal Report will be submitted to FTA for approval by September 1<sup>st</sup> every three fiscal years.

#### **G. Triennial Goal Accountability Reporting**

If the awards and commitments shown on the District's Uniform Report of Awards or Commitments and Payments at the end of any fiscal year are less than the overall goal applicable to that fiscal year, the District shall:

1. Analyze in detail the reasons for the difference between the Triennial Goal and its awards and commitments in that fiscal year;
2. Establish specific steps and milestones to correct the problems identified and to enable the District to meet fully its goal for the new fiscal year;
3. Submit, within 90 days of the end of the fiscal year, the analysis and corrective actions developed above to the appropriate operating administration for approval.

## **Appendix C: Procedures for Determining, Achieving and Counting Contract-Specific Goals**

A Contract-specific DBE goal will be established based on a recommendation and information furnished by the Liaison Officer. The Contract-specific goal will apply to the percentage participation of DBEs in the total Contract work and will be set forth in the Contract specifications. The District is not required to establish a Contract-specific goal for every prime contract with subcontracting opportunities. A Contract-specific goal shall only be established where supported by the findings of the District's Disparity Study or an update to that Study. For each Contract involving subcontracting opportunities, the factors outlined below will be considered to determine whether a Contract-specific goal should be established for the particular contract and, if so, what the percentage goal will be:

1. The projected portion of the overall annual goal that will be met by establishing Contract-specific goals;
2. The progress towards achieving the Triennial Goal;
3. The full range of activities in the proposed Contract;
4. The availability of DBEs as subcontractors or subconsultants in the types of work involved in the performance of the proposed Contract;
5. Any other relevant criteria.

### **A. Required Documentation From Bidders**

Each solicitation for which a DBE contract goal has been established will require the bidders to submit the following information:

1. The names and addresses of DBE firms that will participate in the Contract;
2. A description of the work that each DBE will perform;
3. The dollar amount of the participation of each DBE firm;
4. Written documentation from the bidder regarding its commitment to use DBE subcontractors whose participation the bidder submits to meet a Contract goal;
5. Written confirmation from the DBE that it is participating in the Contract as provided in the bidder's commitment; and
6. If the Contract goal is not met, evidence of good faith efforts to meet the goal

### **B. Process for Evaluation of Bids**

The District will verify all information submitted by a bidder for completeness and accuracy prior to award. The recommendation for award will be based on an evaluation of the criteria set forth below and will be reached in accordance with the District's procedures applicable to specific types of contracting activity. No bidder will be recommended for award unless the bidder has met the Contract goal or has made good faith efforts to do so.

1. The District will require that any DBEs listed by bidders for participation in the contract be certified as eligible DBEs at the time of bid. This includes being certified to perform the specific type of work the DBE has been listed for. This will be determined by comparing the NAICS codes for the work the DBE has been listed for with the NAICS codes the DBE has been certified to perform work for.
2. Any lower-tier DBE subcontractor may be counted toward the DBE goal, although

DBE credit cannot be double counted.

3. On Construction contracts, a DBE prime bidder is counted toward a DBE contract goal for the value of the scopes of work it would perform and for which it is certified. On all other types of contracts and agreements, DBE prime bidders are not counted toward fulfillment of a DBE contract goal.
4. The Liaison Officer will review for accuracy the total dollar value of the work and the percentage of the total Contract bid price reported on the Bidder's DBE subcontractor listing and will compare it to the Contract goal established for the Contract.
5. If the amount of DBE participation does not meet the Contract goal, the Liaison Officer will review the good faith efforts documentation submitted by the bidder, as required by the Contract Specifications. In accordance with 49 CFR Part 26, Appendix F of the District's DBE Program, the Liaison Officer will determine whether the bidder has made good faith efforts to meet the Contract goal.
6. If the Liaison Officer determines that the bidder has not met the Contract goal and has not demonstrated good faith efforts, the Liaison Officer will notify the bidder in writing. The notification will explain the basis and include the reasons for the determination, and will inform the bidder of its right to submit further written documentation or to appear before an independent hearing officer prior to the time that a recommendation for award of Contract is presented to the Board of Directors. After the hearing, the District will provide the bidder with a written decision. The result of the hearing process is not appealable by the bidder to the Department of Transportation. Any bidder requesting a hearing shall be responsible for payment of half of the costs associated with the hearing.

## **Appendix D: DBE Certification Guidelines**

Certification is the process by which all firms seeking to participate in the District's DBE Program are determined to have met the requirements set forth in 49 CFR Part 26. This Appendix provides guidance for certifying firms as DBEs.

### **A. Burdens of Proof**

In accordance with 49 CFR Section 26.61 the firm seeking certification has the burden of demonstrating to the District, by a preponderance of the evidence, that it meets the requirements concerning group membership or individual disadvantage, business size, ownership and control. The District will presume that members of the designated groups identified herein are socially and economically disadvantaged. Where the presumption does not apply or has been rebutted, the individuals have the burden of proving, by a preponderance of the evidence, that they are socially and economically disadvantaged. The District will make determinations concerning whether individuals and firms have met the burden of demonstrating group membership, ownership, control, and social and economic disadvantage by considering all the facts in the record, viewed as a whole.

### **B. Group Membership Determinations**

Pursuant to 49 CFR Section 26.63, if the District has reason to question whether an individual is a member of a group presumed to be socially and economically disadvantaged, the District will require the individual to demonstrate, by a preponderance of the evidence, that he or she is a member of such group. In making that determination, the District will consider whether or not the person has held himself or herself to be a member of the group over a long period of time prior to application for certification and whether the person is regarded as a member of the group by the relevant community. The District may require the applicant to produce appropriate documentation of group membership. If the District determines an individual claiming to be a member of a group presumed disadvantaged is not a member of such group, the individual must demonstrate social and economic disadvantage on an individual basis. The District's decision concerning membership in a designated group will be subject to the certification appeal procedures.

### **C. Social and Economic Disadvantage Determinations**

1. Socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias within American society because of their identities as members of groups and without regard to their individual qualities. Social disadvantage must stem from circumstances beyond their control. Evidence of individual social disadvantage must include at least one objective distinguishing feature that has contributed to social disadvantage such as race, ethnic origin, gender, disability, long-term residence in an isolated environment or similar causes not common to individuals not socially disadvantaged; personal experiences of substantial and chronic social disadvantage in American society, not in other countries; and negative impact on entry into or advancement in the business world



because of the disadvantage. The District will consider any relevant evidence in its assessment of this element, and in every case the District will consider education, employment, and business history to see if the totality of circumstances shows disadvantage in entering into or advancing in the business world.

2. Economically disadvantaged individuals are socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same or similar line of business who are not socially disadvantaged. The District requires submission of narrative and financial information from each individual claiming economic disadvantage, which must describe the conditions that are the basis for the claim in a narrative statement, and the individual must submit personal financial information. The District will require a married individual to submit separate financial information for his/her spouse unless they are legally separated. In considering diminished capital and credit opportunities, the District will examine all factors relating to personal financial condition, including personal income for the past two years, (including bonuses and the value of company stock given in lieu of cash), personal net worth, and the fair market value of all assets, whether encumbered or not.

The District will also consider the financial condition of applicants and compare financial profiles of small businesses in the same primary industry classification(s) or similar lines of business, which are owned and controlled by socially and economically disadvantaged individuals. The financial profiles to be compared include total assets, net sales, pre-tax profit, sales/working capital ratio, and net worth. The District will attribute to any individual claiming disadvantaged status any assets which that individual has transferred to an immediate family member, trust, or beneficiary, or DBE owner to the applicant firm for less than the fair market value within the prior two (2) years of the concern's application, unless that individual demonstrates that the transfer is to or on behalf of an immediate family member for that individual's education, medical or some other form of essential support, excluding gifts for birthdays, graduations, anniversaries, retirements or other special occasions. In determining an individual's access to capital and credit, the District will consider assets transferred by an individual within the previous two (2) year period that are not considered in evaluating the individual's assets and net worth, such as transfers to charities.

3. The District will presume that citizens of the United States (or lawfully admitted permanent residents) who are women, Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent Asian Americans, or other minorities found disadvantaged by the Small Business Administration are socially and economically disadvantaged individuals.
  - a. Pursuant to 49 CFR Section 26.67, the District will require each individual owner of a firm applying to participate as a DBE and whose ownership interest is relied upon for DBE certification to submit a signed, notarized certification that each presumptively disadvantaged owner is, in fact, socially and economically disadvantaged.

- b. Pursuant to 49 CFR Section 26.67, the District will require each individual owner of a firm applying to participate as a DBE and whose ownership interest is relied upon for DBE certification to submit a signed, notarized statement of personal net worth with appropriate supporting documentation that each presumptively disadvantaged owner is, in fact, socially and economically disadvantaged. In determining net worth, the District will exclude an individual's ownership interest in the applicant firm and the individual's equity in his/her primary residence (except any portion of such equity that is attributable to excessive withdrawals from the applicant firm). A contingent liability does not reduce an individual's net worth.
  - i. If the statement of personal net worth that an individual submits shows the individual's personal net worth to exceed \$1.32 million, the individual's presumption of economic disadvantage will be rebutted. The District is not required to have a proceeding in order to rebut the presumption of economic disadvantage in this case.
  - ii. If the statement of personal net worth that an individual submits shows the individual's personal net worth to exceed \$1.32 million, the District may consider in evaluating the individual based on these factors: (1) whether the average adjusted gross income of the owner over the most recent three-year period exceeds \$350,000; (2) whether the income was unusual and not likely to occur in the future; (3) whether the earnings were offset by losses; (4) whether the income was reinvested in the firm or used to pay taxes arising in the normal course of operations by the firm; (5) other evidence that income is not indicative of lack of economic disadvantage, and (6) whether the fair market value of all assets exceed \$6 million.
  - iii. If the District has a reasonable basis to believe that an individual who is a member of one of the designated groups is not, in fact, socially and/or economically disadvantaged the District may, at any time, start a proceeding to determine whether the presumption should be regarded as rebutted with respect to that individual. The District must follow the procedures set forth in 49 CFR Section 26.87. The District may require the individual to produce additional information relevant to the determination of his/her disadvantage.

When an individual's presumption of social and/or economic disadvantage has been rebutted, his/her ownership and control of the firm cannot be used for purposes of DBE eligibility unless and, until he/she makes an individual showing of social and/or economic disadvantage. If the basis for rebutting the presumption is a determination that the individual's personal net worth exceeds \$1.32 million, the individual is no longer eligible for participation in the Program and cannot regain eligibility by making an individual showing of disadvantage.

Pursuant to 49 CFR Section 26.67(d), firms owned and controlled by individuals who are not presumed to be socially and economically disadvantaged (including individuals whose presumed disadvantage has been rebutted) may be certified by the District on a case-by-case basis. The District will determine whether each individual whose ownership and control are relied upon for DBE certification is socially and economically disadvantaged. In such a proceeding, the applicant firm must demonstrate, by a preponderance of the evidence, that each of the individuals who own and control it is socially and economically disadvantaged. An individual whose personal net worth exceeds \$1.32 million will not be determined to be economically disadvantaged. The District will use guidance in Appendix E of 49 CFR Part 26.

#### **D. Business Size Determinations**

In accordance with to 49 CFR Section 26.65, in order to be an eligible DBE, a firm (including, its affiliates) must be an existing small business as defined by SBA standards. The District will apply current SBA business size standards found in 23 CFR Part 121 appropriate to the types of work the firm seeks to perform in federally-funded Contracts. Even if the firm meets the SBA requirements, a firm is not an eligible DBE in any federal fiscal year if the firm (including its affiliates) has had average annual gross receipts as defined by SBA regulations over the firm's previous three fiscal years in excess of \$23.98 million, as adjusted for inflation from time to time.

#### **E. Ownership Determinations**

1. In accordance with 49 CFR Section 26.69, in determining whether the socially and economically disadvantaged participants in a firm own the firm, the District will consider all the facts in the record, viewed as a whole.
2. To be an eligible DBE, a firm must be at least 51 percent owned by socially and economically disadvantaged individuals. In the case of a corporation, such individuals must own at least 51 percent of each class of voting stock outstanding and at least 51 percent of the aggregate of all stock outstanding. In the case of a partnership, at least 51 percent of each class of partnership interest must be owned by socially and economically disadvantaged individuals and must be reflected in the firm's partnership agreement. In the case of a corporation, at least 51 percent of each class of member interest must be owned by socially and economically disadvantaged individuals.
3. The firm's ownership by socially and economically disadvantaged individuals must be real, substantial and continuing, going beyond pro forma ownership of the firm as reflected in the ownership documents. The disadvantaged owners must enjoy the customary incidents of ownership and should be entitled to the profits and loss commensurate with their ownership interests; and any terms or practices that give a non-disadvantaged individual or firm a priority or superior right to a firm's profits are grounds for denial of certification.
4. All securities that constitute ownership will be held directly by disadvantaged

persons. Except as provided in 49 CFR Section 26.69(d), no securities or assets held in trust, or by any guardian for a minor, are considered as held by disadvantaged persons in determining ownership of a firm.

5. The contributions of capital or expertise by the socially and economically disadvantaged owners to acquire their ownership interests must be real and substantial.
6. In a situation in which an individual's expertise is relied upon as part of a disadvantaged owner's contribution to acquire ownership, the owner's expertise must be: in a specialized field; of outstanding quality; in areas critical to the firm's operations; indispensable to the firm's potential success; specific to the type of work the firm performs; and documented in the records of the firm. The individual whose expertise is relied upon must have a significant financial investment in the firm.
7. For purposes of determining ownership, the District will deem as held by a socially and economically disadvantaged individual all interests in a business or other assets obtained by the individual:
  - a. As the result of a final property settlement or court order in a divorce or legal separation; and
  - b. Through inheritance or otherwise because of the death of the former owner.
8. The District will presume as not being held by a socially and economically disadvantaged individual, for purposes of determining ownership, all interests in a business or other assets obtained by the individual as the result of a gift, or transfer without adequate consideration, from any non-disadvantaged individual or non-DBE firm which is:
  - a. Involved in the same firm for which the individual is seeking certification, or an affiliate of that firm;
  - b. Involved in the same or a similar line of business; or
  - c. Engaged in an ongoing business relationship with the firm, or an affiliate of the firm, for which the individual is seeking certification.
9. To overcome the foregoing presumption and permit the interests or assets to be counted, the disadvantaged individual must demonstrate by clear and convincing evidence that:
  - a. The gift or transfer was made for reasons other than obtaining certification as a DBE; and;
  - b. The disadvantaged individual actually controls the management, policy, and operations of the firm, notwithstanding the continuing participation of a non-disadvantaged individual who provided the gift or transfer.
10. The District will apply the following rules in situations in which marital assets form a basis for ownership of a firm:
  - a. When marital assets (other than the assets of the business in question), held

jointly or as community property by both spouses, are used to acquire the ownership interests asserted by one spouse, the District will deem ownership interest in the firm to have been acquired by that spouse with his/her individual resources, provided that the other spouse irrevocably renounces and transfers all rights in the ownership interest in the manner sanctioned by the laws of the state in which either spouse or the firm is domiciled. The District will not count a greater portion of joint or community property assets toward ownership than state law would recognize as belonging to the socially and economically disadvantaged owner of the firm.

- b. A copy of the document legally transferring and renouncing the other spouse's rights in the jointly owned or community assets used to acquire an ownership interest in the firm must be included as part of the firm's application for DBE certification.
11. The District may consider the following factors in determining the ownership of a firm, but will not regard a contribution of capital as failing to be real and substantial nor find a firm ineligible, solely because:
- a. A socially and economically disadvantaged individual acquired his/or her ownership interest as the result of a gift or transfer without adequate consideration other than the types set forth in Appendix D, paragraph E above;
  - b. There is a provision for the co-signature of a spouse who is not a socially and economically disadvantaged individual on financing agreements, contracts for the purchase or sale of real or personal property, bank signature cards, or other documents; or
  - c. Ownership of the firm in question or its assets is transferred for adequate consideration from a spouse who is not a socially and economically disadvantaged individual to a spouse who is such an individual. In this case, the District will give particularly close and careful scrutiny to the ownership and control of a firm to ensure that it is owned and controlled, in substance as well as in form, by a socially and economically disadvantaged individual.

#### **F. Control Determinations**

- 1. In accordance with 49 CFR Section 26.71, in determining whether socially and economically disadvantaged owners control a firm, the District will consider all the facts in the record, viewed as a whole.
- 2. Only an independent business may be certified as a DBE. An independent business is one the viability of which does not depend on its relationship with another firm or firms. In determining whether a potential DBE is an independent business, the District will scrutinize relationships with non-DBE firms in such areas as personnel, facilities, equipment, financial and/or bonding support, and other resources. The District will consider present or recent employer/employee relationships, the firm's relationship with prime contractors, and factors related to the independence of a potential DBE firm. Further, the District will consider the consistency of relationships between the potential DBE and non-DBE firms with normal industry practice.

3. A DBE firm must not be subject to any formal or informal restrictions which limit the customary discretion of the socially and economically disadvantaged owners.'

The socially and economically disadvantaged owners must possess the power to direct or cause the direction of the management and policies of the firm and to make day-to-day as well as long-term decisions on matters of management, policy and operations. In a corporation, disadvantaged owners must control the board of directors.

4. A disadvantaged owner must hold the highest officer position in the company (e.g. chief executive officer or president). In a corporation, disadvantaged owners must control the Board of Directors.
5. In a partnership, one or more disadvantaged owners must serve as general partners with control over all partnership decisions.
6. Individuals who are not socially and economically disadvantaged may be involved in a DBE firm as owners, managers, employees, stockholders, officers, and/or directors. Such individuals must not possess or exercise the power to control the firm, or be disproportionately responsible for the operation of the firm. The socially and economically disadvantaged owners may delegate various areas of management, policymaking, or daily operations of the firm to other participants in the firm, regardless of whether these participants are socially and economically disadvantaged individuals. Such delegations of authority must be revocable, and the socially and economically disadvantaged owners must retain the power to hire and fire any person to whom such authority is delegated. The managerial role of the socially and economically disadvantaged owners in the firm's overall affairs must be such that the District can reasonably conclude that the socially and economically disadvantaged owners actually exercise control over the firm's operations, management and policy.
7. The socially and economically disadvantaged owners must have an overall understanding of, and managerial and technical competence directly related to, the type of business in which the firm is engaged and the firm's operations.
8. If the state or local law requires the persons to have a particular license or other credential in order to own and/or control a certain type of firm, then the socially and economically disadvantaged persons who own and control a potential DBE firm of that type must be the qualifying individual for the required license or credential.
9. The District will consider differences in remuneration between socially and economically disadvantaged owners and other participants in the firm, in the context of the duties involved, normal industry practices, and the firm's policies and practices.
10. In order to be viewed as controlling the firm, a socially and economically disadvantaged owner cannot engage in outside employment or other business interests which conflict with the management of the firm or prevent the individual

from devoting sufficient time and attention to the affairs of the firm.

11. A socially and economically disadvantaged individual may control the firm even though one or more of the individual's immediate family members (who themselves are not socially and economically disadvantaged individuals) participate in the firm. If the District cannot determine that the socially and economically disadvantaged owners, as distinct from the family as a whole, control the firm, then the socially and economically disadvantaged owners have failed to carry the burden of proof concerning control even though they may participate significantly in the firm's activities.
12. Where a firm was formerly owned and/or controlled by a non-disadvantaged individual (whether or not an immediate family member), ownership and/or control were transferred to a socially and economically disadvantaged individual, and the non-disadvantaged individual remains involved with the firm in any capacity, the disadvantaged individual now owning the firm must demonstrate by clear and convincing evidence that the transfer of ownership and/or control to the disadvantaged individual was made for reasons other than obtaining certification as a DBE and that the disadvantaged individual controls the management, policy, and operations of the firm, notwithstanding the continuing participation of a non-disadvantaged individual who formerly owned and/or controlled the firm.
13. In determining whether a firm is controlled by its socially and economically disadvantaged owners, the District will consider whether the firm owns equipment necessary to perform its work. The District will not determine that a firm is not controlled by socially and economically disadvantaged individuals solely because the firm leases, rather than owns, such equipment, where leasing equipment is a normal industry practice and the lease does not involve a relationship with a prime contractor or other party that compromises the independence of the firm.
14. The District will grant certification to a firm only for specific types of work in which the socially and economically disadvantaged owners have the ability to control the firm. To become certified in an additional type of work, the firm must demonstrate only that its socially and economically disadvantaged owners are able to control the firm with respect to that type of work. The District will not require that the firm be recertified or submit a new application for certification but will verify the disadvantaged owner's control of the firm and the additional type of work.
15. The District may certify a business operating under a franchise or license agreement if it meets the standards in 49 CFR Part 26 Subpart D, and the franchiser or licensor is not affiliated with the franchisee or licensee. In determining whether affiliation exists, the District will generally not consider restraints relating to standardized quality, advertising, accounting format, and other provisions imposed by the franchise agreement or license, provided the franchisee or licensee has the right to profit from its efforts and bears the risk of loss commensurate with ownership.

16. In order for a partnership to be controlled by socially and economically disadvantaged individuals, any non-disadvantaged partners must not have the power, without the specific written concurrence of the socially and economically disadvantaged partner, to contractually bind the partnership or subject the partnership to contract or tort liability.
17. The socially and economically disadvantaged individuals controlling a firm may use an employee leasing company. This does not preclude such individuals from controlling their firm if they continue to maintain an employer-employee relationship with the leased employees, including responsibility for hiring, firing, training, assigning, and otherwise controlling on-the-job activities of the employees as well as ultimate responsibility for wage and tax obligations related to the employees.

#### **G. Other Considerations**

1. Except as provided in Appendix D, paragraph E, below, the District will not consider commercially useful function issues in any way in making decisions about whether to certify a firm as a DBE. Consideration of whether a firm performs a commercially useful function or is a regular dealer pertains solely to counting toward DBE goals any participation of firms, which have already been certified as DBEs.
2. In making certification decisions, the District will consider whether a firm has exhibited a pattern of conduct indicating its involvement in attempts to evade or subvert the intent or requirements of the DBE program.
3. The District will evaluate the eligibility of a firm on the basis of present circumstances and will not refuse to certify a firm based solely on historical information indicating lack of ownership or control by socially and economically disadvantaged individuals at some time in the past, if the firm currently meets ownership and control standards. The District will not refuse to certify a firm solely on the basis that it is a newly formed firm.
4. The District expects all participants in the District's DBE Program, including DBE firms and firms seeking DBE certification, to cooperate fully with requests for information relevant to the certification process and other requests for information. Failure or refusal to provide such information is a ground for denial or removal of certification or such other remedies as may be provided by 49 CFR Section 26.109(c).
5. Only firms organized for profit may be eligible DBEs. Not-for-profit organizations, even though controlled by socially and economically disadvantaged individuals, are not eligible to be certified as DBEs.
6. An eligible DBE firm must be owned by individuals who are socially and economically disadvantaged. Except as provided by this policy and in 49 CFR Section 26.73(e), a firm that is not owned by such individuals, but instead is owned by another firm—even a DBE firm—cannot be an eligible DBE.

If socially and economically disadvantaged individuals own and control a firm through a parent or holding company, established for tax, capitalization, or other



purposes consistent with industry practice, and the parent or holding company, in turn, holds and controls an operating subsidiary, the District may certify the subsidiary if it otherwise meets all requirements of 49 CFR Part 26, including the requirement that there be cumulatively at least 51 percent ownership of the subsidiary by socially and economically disadvantaged individuals. In this situation, the individual owners and controllers of the parent or holding company are deemed to control the subsidiary through the parent or holding company.

7. Recognition of a business as a separate entity for tax or corporate purposes is not necessarily sufficient to demonstrate that a firm is an independent business, owned and controlled by socially and economically disadvantaged individuals.
8. The District will not require that a DBE firm be prequalified as a condition for certification unless the District requires all firms that participate in its contracts and subcontracts, or in a particular contract or subcontract be prequalified.
9. The District recognizes that a firm owned by an Indian tribe, Alaska Native Corporation, or Native Hawaiian organization as an entity, rather than by Indians, Alaska Natives, or Native Hawaiians as individuals, may be eligible for certification as long as such firm meets the size standards and is controlled by socially and economically disadvantaged individuals.
10. All firms whose primary place of business is located in or is domiciled within the Market Area are presumptively assumed to meet the residency requirements. The District's Market Area is determined by the most recent Disparity Study. There may be a distinct Market Area for each type of Contracting or Procurement.

In order for a firm with a principal place of business located outside of the Market Area to be eligible to benefit from the race and gender-conscious program, the firm must show that it has attempted to do business in the Market Area by meeting the following requirements:

- a. Currently or previously a party to a Contract to do work in the Market Area.
- b. Attendance at a BART-sponsored outreach meetings, including pre-bid meetings, town hall meetings and/or Board of Director meetings.
- c. Any form of communication with BART, including purchasing contract documents, requesting information from BART and attending or registering to attend BART sponsored outreach events.

## **Appendix E: Certification Procedures**

### **A. Initial Certification Procedures**

In accordance with 49 CFR Section 26.83, the District will ensure that only firms certified as eligible DBEs participate as DBEs in the DBE Program. The District will determine the eligibility of firms as DBEs consistent with the standards of 49 CFR Part 26, Subpart D.

1. Within ninety (90) days, the District will take all the following steps in determining whether a DBE firm meets said standards:
  - a. The District will perform an on-site visit to the offices of the firm and will interview key personnel(s) of the firm and review their resumes and/or work histories. The District will also perform visits to job sites if there are such sites on which the firm is working in the District's jurisdiction at the time of the eligibility investigation. The District may rely upon the site visit reports of any other U.S. DOT grantee with respect to a firm applying for certification;
  - b. If the firm is a corporation, the District will analyze the ownership of stock in the firm as well as all relevant documents;
  - c. Analyze the bonding and financial capacity of the firm;
  - d. The District will determine the work history of the firm, including contracts it has received, and work it has completed;
  - e. The District will obtain a statement from the firm of the type of work it prefers to perform as part of the DBE Program and its preferred locations for performing the work, if any;
  - f. The District will obtain or compile a list of equipment owned by or available to the firm and the licenses the firm and its key personnel possess to perform the work it seeks to do as part of the DBE Program; and
  - g. The District will require potential DBEs to complete and submit an appropriate application form. The District will assure that the applicant attests to the accuracy and truthfulness of the information on the application form. This will be done either in the form of an affidavit sworn to by the applicant before a person authorized by state law to administer oaths or in the form of an unsworn declaration executed under penalty of perjury of the laws of the United States. The District will review all information on the form prior to making a decision about the DBE eligibility of the firm.
2. When another grantee, in connection with its consideration of the eligibility of a firm, makes a written request for certification information the District has obtained about that firm, the District will promptly make the information available to the other grantee.
3. The District will not impose an application fee for firms to participate in the DBE certification process.

4. The District shall safeguard from disclosure from unauthorized persons all information gathered as part of the certification process that may be regarded as proprietary or other confidential business information, consistent with applicable federal, state and local laws.
5. Once the District has certified a firm as a DBE, it will remain certified until its certification has been removed, in whole or in part. The District will not require DBEs to reapply for certification as a condition of continuing to participate in the Program, however a certification review may be conducted whenever there has been a change in DBEs circumstances.
6. Once certified, a DBE firm must inform the District in writing of any changes in circumstances affecting the firm's ability to meet size, disadvantaged status, ownership, or control requirements, or any material change in the information provided in the certification application process, and attach supporting documentation describing in detail the nature of such changes. Changes in management responsibility among members of a limited liability company are also covered by this requirement. Such notice of change from the DBE firm must take the form of an affidavit sworn to before a person authorized by state law to administer oaths, or of an unsworn declaration executed under penalty of perjury of the laws of the United States. The written notification must be provided by the DBE within thirty (30) days of occurrence of the change(s). If the DBE fails to make timely notification of such change(s), it will be deemed to have failed to cooperate as required.
7. The District will make decisions on applications for DBE certification within ninety (90) days of receiving from the applicant firm all information required. The District may extend this time period once, for no more than an additional sixty (60) days, upon written notice to the firm explaining the reasons for the extension.

#### **B. DBE Certification of Continuing Eligibility**

Every firm certified by the District as a DBE must provide to the District every year on the anniversary of the date of initial certification, an affidavit sworn to by the firm's owners before a person who is authorized by state law to administer oaths or an unsworn declaration executed under penalty of perjury of the laws of the United States. This affidavit must affirm that there have been no changes in the firm's circumstances affecting its ability to meet size, disadvantaged status, ownership, or control requirements of 49 CFR Part 26 or any material changes to the information provided in its original application, except for changes about which it has notified the District. The affidavit will specifically affirm that the DBE continues to meet SBA business size criteria and the overall gross receipts cap set forth in 49 CFR Part 26, documenting this affirmation with supporting documentation of the DBE's size and gross receipts. If the DBE fails to provide this information in a timely manner, it will be deemed to have failed to cooperate as required.

### **C. Suspension of Certification**

Pursuant to 49 CFR Section 26.88, the District shall immediately notify the DBE of the suspension by certified mail, return receipt requested, to the last known address of the owner(s) of the DBE.

### **D. Denials and Reapplication Procedures**

Pursuant to 49 CFR Section 26.85, when the District denies a request by a firm that is not currently certified, the District will provide the firm a written explanation of the reasons for the denial, specifically referencing the evidence in the record that supports each reason for the denial. All documents and other information on which the denial is based will be made available to the applicant firm upon request. - When a firm is denied certification, it is required to wait twelve (12) months before it may reapply for DBE certification with the District. The time period for reapplication begins to run on the date the explanation for denial of certification is received by the applicant firm.

### **E. Removal Procedures (Decertification)**

1. Any person may file with the District a written complaint alleging that a currently certified firm is ineligible and specifying the alleged reasons why the firm is ineligible. The District is not required to accept a general allegation that a firm is ineligible or an anonymous complaint. The complaint will include any information or arguments supporting the assertion that the firm is ineligible and should not continue to be certified. Confidentiality of complainants' identities will be protected. The District will review all records concerning the firm, any material provided by the firm and the complainant, and other available information. If the District determines based on this review that there is reasonable cause to believe the firm is ineligible, the District will provide written notice to the firm of its intention to find the firm ineligible with the reasons for the proposed determination. If the District determines such reasonable cause does not exist, the District will notify the complainant and the firm in writing of this determination and the reasons therefore. All statements of reasons for findings on the issue of reasonable cause will specifically reference the evidence in the records on which each reason is based.
2. Based on notification by the DBE firm of a change in its circumstances or other information that comes to the District, if the District determines there is reasonable cause to believe a currently certified firm is ineligible, the District will provide written notice to the firm of its intention to find a firm ineligible, setting forth the reasons for the proposed determination. The statement of reasons for the finding of reasonable cause will specifically reference the evidence in the record on which each reason is based.
3. If a U.S. DOT agency determines that information in the certification records or other information available provides reasonable cause to believe that a firm certified by the proceeding to remove the firm's certification. The agency must provide the District and the firm a notice setting forth reasons for the directive, including relevant documentation. The District will immediately commence and prosecute a proceeding to remove the eligibility of the firm.
4. When the District notifies a firm that there is cause to remove its eligibility as

provided above, the District will give the firm an opportunity for an informal hearing at which the firm may respond to the reasons for the proposal to remove eligibility in person and provide information and arguments concerning why it should remain certified. In such proceeding, the District bears the burden of proving, by a preponderance of the evidence, that the firm does not meet the certification standards. The District will maintain a complete verbatim record of the hearing. If there is an appeal to U.S. DOT, the District will provide a transcript of the hearing to U.S. DOT and, on request, to the firm. The District will retain the original record of the hearing. The DBE firm may elect to present information and arguments in writing without a hearing. In such event, the District bears the same burden of proving, by a preponderance of the evidence that the firm does not meet the certification standards. All parties requesting a hearing shall be responsible for half of the cost of the hearing.

5. All proceedings by the District to remove a firm's eligibility shall be made by an outside independent hearing officer selected in accordance with District procedures.
6. The District will not base a decision to remove eligibility on a reinterpretation or changed opinion of information available to the District at the time of its certification of the firm. The District will base such decision only on one or more of the following: changes in the firm's circumstances since the certification, information or evidence not available at the time of certification, information that was concealed or misrepresented by the firm in previous certification actions, change in the certification standards or requirements of U.S. DOT since the firm was certified, or a documented finding that the District's determination to certify the firm was clearly erroneous.
7. The District will provide the firm written notice of the decision and the reasons for it, including specific references to the evidence in the record that supports each reason for the decision. The notice will inform the firm of the consequences of the District's decision and of the availability of an appeal to U.S. DOT. The District will send copies of the notice to the complainant in an ineligibility complaint or to the concerned U.S. DOT agency that directed the District to initiate the proceeding.
8. A firm remains an eligible DBE during the proceeding. The firm does not become ineligible until the issuance of the notice of decision provided for in Appendix E, Paragraph D, above.
9. The District will take the following action upon removing a firm's eligibility:
  - a. When a Prime Contractor has made a commitment to use the ineligible firm, or the District has made a commitment to use a DBE Prime Contractor but a subcontract or contract has not been executed before issuance of the decertification notice, the ineligible firm does not count toward the Contract goal or Triennial Goal. The District will direct the Prime Contractor to meet the Contract goal with an eligible DBE or to demonstrate that it has made good faith efforts to do so.

- b. If a Prime Contractor has executed a subcontract with the firm before issuance of the decertification notice, the Prime Contractor may continue to use the firm on the contract and may continue to receive credit toward its DBE goal for the firm's work. When the District has let a Prime Contract to the DBE later ruled ineligible, the portion of the ineligible firm's performance of the Contract remaining after issuance of the notice will not count toward the Triennial Goal but may count toward the Contract goal.
  - c. If the DBE's ineligibility is caused solely by its having exceeded the size standard during the performance of the Contract, the District will continue to count its participation on that Contract toward the Triennial Goal and Contract Goals.
10. In the event that a firm is denied certification the firm may reapply for certification once a period of twelve (12) months has elapsed from the date the notice of denial was issued, pursuant to 49 CFR Section 26.86.

#### **F. Process for Certification Appeals to U.S. Department of Transportation**

A firm which has been denied certification or whose eligibility is removed may make an administrative appeal to the U.S. Department of Transportation pursuant to 49 CFR Section 26.89. All appeals will be sent to the U.S. Department of Transportation, Office of Civil Rights, 400 Seventh Street, S.W., Room 2401, Washington, D.C. 20590. Pending the U.S. DOT decision, the District's decision remains in effect. If a firm wishes to file an appeal, it must send a letter to U.S. DOT within ninety (90) days of the date of the District's final decision, including information concerning why the District's decision should be reversed.

An appellant firm challenging certification denial or removal by the District must submit a letter with the name and address of any other U.S. DOT grantee that currently certifies the firm, of any other grantees that may have rejected an application for certification from the firm or removed the firm's eligibility within one year prior to the date of the appeal, or of any other grantee with which an application for certification or action to remove eligibility is pending and must include in their letter a statement specifying why the certification decision is erroneous, the significant facts that were not considered, or the regulatory provisions that was improperly applied. An appellant in a third-party ineligibility complaint that appeals the District's decision to U.S. DOT will be requested by U.S. DOT to promptly provide all information requested.

The District agrees to provide to U.S. DOT the complete administrative record within twenty (20) days of its request unless U.S. DOT extends this time period. U.S. DOT will make its decision based solely on the entire administrative record without conducting a hearing. When the District provides information to U.S. DOT, the same information will be made available to the firm and to any third-party complainant involved, consistent with applicable law.

U.S. DOT will affirm the District's decision unless it determines, based on the entire administrative record, that the decision is not supported by substantial evidence or is inconsistent with the substantive or procedural provisions concerning certification. If U.S.

DOT determines that the District's decision was unsupported, U.S. DOT will reverse the District's decision and will direct the District to certify the firm or to remove its eligibility, as applicable. The District will take the action directed by U.S. DOT immediately upon receiving written notice.

U.S. DOT is not required to reverse the District's decision if it determines a procedural error did not result in fundamental unfairness to the appellant or substantially prejudice the opportunity of the appellant to present its case. If it appears that the record is incomplete or unclear, U.S. DOT may remand the record to the District with instructions seeking clarification or augmentation of the record before making a finding.

U.S. DOT will not uphold the District's decision based on grounds not specified in the District's decision. U.S. DOT's decision will be based on the status and circumstances of the firm on the date of the decision, which was appealed. U.S. DOT will provide written notice of its decision to the District, the firm, and the complainant in an ineligibility complaint. The notice will include the reasons for U.S. DOT's decision. It is U.S. DOT's policy to make a decision within one hundred eighty (180) days of receiving the complete administrative record. All decisions by U.S. DOT are administratively final and are not subject to petitions for reconsideration.

#### **G. District Actions Following U.S. Department of Transportation Decision**

Pursuant to 49 CFR Section 26.91, the decisions of U.S. DOT are binding on the District. Such decisions are not binding, however, on other U.S. DOT grantees. The District will take the following actions after U.S. DOT decisions:

1. If U.S. DOT determines that the District erroneously certified a firm, the District must remove the firm's eligibility on receipt of the determination without further proceedings.
2. If U.S. DOT determines that the District erroneously failed to find reasonable cause to remove the firm's eligibility, the District will expeditiously commence a proceeding to determine whether the firm's eligibility should be removed.
3. If U.S. DOT determines that the District erroneously declined to certify eligibility of the firm, the District must certify the firm effective on the date of receipt of the written notice.
4. If U.S. DOT determines that the District erroneously determined that the presumption of social and economic disadvantaged either should or should not be deemed rebutted, the District must take appropriate corrective action as determined by U.S. DOT.
5. If U.S. DOT affirms the District's determination, no further action is necessary.
6. Where U.S. DOT has upheld the District's denial of certification or removal of eligibility of a firm, or directed the removal of a firm's eligibility, other grantees with whom the firm is certified may commence a proceeding to remove the firm's eligibility. If the District receives information on a U.S. DOT decision of DBE

eligibility or ineligibility, the District will take the U.S. DOT action into account in any certification action involving the firm.

## **H. Interstate Certifications**

The District will adhere to the interstate certification guidelines contained in 49 CFR Section 26.85.

1. When a firm that is currently certified in its Home State seeks certification by the District, the District has the option of accepting this certification and certifying the firm. The District will request a copy of the firm's certification notice from its Home State. Only a copy of the firm's actual certification notice from its Home State will be acceptable. Once this certification notice has been received, the District will confirm that this firm is certified in its Home State by reviewing the electronic directory of the home state and/or requesting written confirmation from the firm's home state.
2. Should the District elect not to certify the firm as described in Section 1 above, in such event the firm will be required to submit the information described below in Section 3 below, provided that the District shall take the following actions:
  - a. Within seven days contact the firm's Home State and request a copy of the site visit review report for the firm, any updates to the site visit review, and any evaluation of the firm based on the site visit.
  - b. Determine whether there is good cause to believe that the Home State's certification of the firm is erroneous or should not apply in California. Reasons for making such a determination may include the following:
    - i. Evidence that the firm's certification was obtained by fraud;
    - ii. New information, not available to the certifying agency at the time of its certification, showing that the firm does not meet all eligibility criteria;
    - iii. The original certification was clearly erroneous or was inconsistent with the requirements of this part;
    - iv. The state law of California requires a result different from that of the state law of the firm's Home State; or
    - v. The information provided by the applicant firm did not meet the requirements of 49 CFR Part 26.85(c).
  - c. If the District has determined that there is no good cause to believe that the firm's certification in its Home State is erroneous or should not apply, BART will, no later than 60 days from the date on which it received from the applicant firm all the information required by 49 CFR Part 26.85(c), send to the applicant firm a notice that it is certified and place the firm on its directory of certified firms.
  - d. If the District has determined that there is good cause to believe that the firm's certification in its Home State is erroneous or should not apply, BART will, no later than 60 days from the date on which it received from the applicant firm all the information required, send to the applicant firm a notice stating the



reasons for its determination. This notice will state with particularity the specific reasons why the District believes that the firm does not meet the requirements of 49 CFR Part 26 for DBE eligibility and must offer the firm an opportunity to respond to the District with respect to these reasons. The applicant firm may elect to respond in writing, to request an in-person meeting with the District to discuss any objections to the firm's eligibility, or both. If the firm requests a meeting BART will schedule the meeting to take place within 30 days of receiving the firm's request.

- e. The applicant firm bears the burden of demonstrating, by a preponderance of evidence, that it meets the requirements of the regulations with respect to the particularized issues raised by the District's notice. The District will issue a written decision within 30 days of the receipt of the written response from the firm or the meeting with the decision maker, whichever is later. During this time the firm's application for certification shall be stayed pending the outcome of the process. A decision under this section G.2. may be appealed to the Departmental Office of Civil Rights under 49 CFR Part 26.89.
3. In the event that the District chooses not to certify an applicant firm as described in section G.2 above, the applicant firm will be required to submit:
- a. A complete copy of the application form, all supporting documents, and any other information submitted to the firm's Home State or any other state related to the firm's certification. This includes affidavits of no change and any notices of changes that the applicant firm has submitted to its Home State, as well as any correspondence the applicant firm has had with its Home State's UCP or any other recipient concerning its application or status as a DBE firm.
  - b. Any notices or correspondence from states other than the applicant firm's Home State relating to the applicant firm's status as an applicant or certified DBE in those states.
  - c. Any correspondence or notices related to the filing a certification appeal with DOT. This includes the applicant firm's letter of appeal and the DOT's response.
  - d. An affidavit sworn to by the firm's owners before a person who is authorized by State law to administer oaths or an unsworn declaration executed under penalty of perjury of the laws of the United States which affirms that:
    - i. The applicant firm has submitted all the information required by 49 CFR 26.85(c) and the information is complete and, in the case of the information required by §26.85(c)(1), is an identical copy of the information submitted to the applicant firm's Home State.
    - ii. If the on-site report from the applicant firm's home state, supporting its certification in its Home State is more than three years old, as of the date

of its application to the District, that the applicant firm affirms that the facts in the on-site report remain true and correct.

- e. Within seven (7) days of receipt of the information the District shall:
  - i. Contact the certifying agency or UCP in the applicant firm's Home State and request a copy of the site visit review report for the firm, any updates to the site visit review, and any evaluation of the firm based on the site visit.
  - ii. In the event that the District does not receive the information requested from the applicant firm's Home State within fourteen (14) days from a timely request it will hold certification action required in abeyance pending receipt of the site visit review report.
  - iii. In the event that the certification action is held in abeyance the District shall notify the applicant firm within 30 days from the date on which it received from an applicant firm all the information required by section G. 3, in writing of the delay in the process and the reason for it.
- f. Upon receipt of the information requested in section G.3 the District will determine whether there is good cause to believe that the Home State's certification of the firm is erroneous or should not apply. This determination will be consistent with 49 CFR Part 26.85 (d).

## **Appendix F: Procedures for Good Faith Efforts to Meet Goals**

Good faith efforts are those that, given all relevant circumstances, a bidder actively and aggressively seeking to meet the goal would make. The bidder must show that it took all necessary and reasonable steps to achieve a DBE goal or other requirement of this part, which, by their scope, intensity, and appropriateness to the objective, could reasonably be expected to obtain sufficient DBE participation, even if they were not fully successful. Only those efforts made prior to Bid opening will be considered for evaluation of good faith efforts. Each bidder is strongly encouraged to attend the pre-bid meeting listed by the District in the invitation to bid. The meeting is intended to cover the DBE program requirements for the Contract, to inform DBEs of subcontracting opportunities, and to provide an opportunity for bidders to meet and/or solicit subcontractors. Regardless of whether a bidder attends the meeting, the bidder assumes responsibility for being informed and complying with the DBE requirements.

In determining whether good faith efforts have been made, the District will consider, on the basis of documentation timely submitted by the bidder, the quality, quantity, and the intensity of the different kinds of efforts that the bidder has made. The efforts employed by the bidder should be those that one could reasonably expect a bidder to take if the bidder were actively and aggressively trying to obtain DBE participation sufficient to meet the DBE contract goal. Mere pro forma efforts are not good faith efforts to meet the DBE contract requirements. Any bidder failing to meet or exceed a DBE goal shall be required to submit all documentation of their good faith efforts within five (5) working days of the bid or proposal submission deadline.

On construction contracts with race conscious goals, a DBE prime bidder may fulfill the DBE contract goal with its own participation in the specified scopes of work of the contract. If a DBE prime bidder fulfills all of the DBD contract goal through its own participation, it is exempt from these good faith efforts.

Only steps taken by the bidder (as opposed to those taken on the bidder's behalf by a third party) will be considered. The steps listed below are reflective of good faith efforts taken by a bidder actively and aggressively seeking to meet the DBE Contract goal.

The District considers each of the listed steps particularly significant in evaluating a bidder's good faith efforts.

### **A. Pre-Bid Meeting**

A bidder's failure to attend the pre-bid meeting and/or matchmaking sessions will be considered a significant factor and may result in an adverse determination by the District in assessing good faith efforts.

### **B. Identification of Subcontracting Opportunities**

It is the responsibility of the bidder to identify potential categories of work where subcontracting opportunities exist on a contract-by-contract basis. Additionally, the bidder must identify appropriate DBE firms who are capable of and certified to perform the categories of work identified in this analysis of subcontracting opportunities. Failure by a

bidder to conduct and document this analysis will be considered adversely by the District in assessing good faith efforts. As used herein, "appropriate" refers to those firms who have been certified by a member of the CUCP to perform any category of work to be subcontracted.

### **C. Advertisement**

No fewer than 21 days prior to the bid opening date, a bidder will have in place advertisements soliciting sub-bids on this Contract from DBEs. If, due to the bidding schedule established by the District, 21 days are not available, advertisements for a shorter reasonable period of time is acceptable. Such advertisements will refer only to bids for the District's contract and will specify the categories of work for which subcontracting opportunities exist for the District's contract. The advertisements will be placed in three or more paid daily or weekly minority and/or women trade association newspapers or other minority and/or women trade focus publications or media. The advertisements will be in publications or media that can reasonably be expected to reach both women and minority DBE firms that are likely to bid on this Contract.

### **D. Communication with DBE Firms**

A bidder will solicit sub-bids by mailing registered or certified letters to DBE firms qualified to perform those categories of work which the bidder is willing to subcontract. Solicitation letters will be mailed no fewer than 21 days prior to the bid opening date. If, due to the bidding schedule established by the District, 21 days are not available, a mailing providing a shorter reasonable period of notice is acceptable. The letters will be mailed to no fewer than 10 appropriate certified DBE firms for each category of work sought to be subcontracted, or to a number of such firms equal to 100% of the DBEs listed for each such category of work in the CUCP database, whichever is less.

The letters to certified DBE firms will

1. Clearly identify portions of the work, which the bidder is willing to have performed by subcontractors, and offer to break down any portion of the work into economically feasible units in order to facilitate DBE participation.
2. Identify if there is a bond waiver requirement for subcontractors for this contract and the specific dollar value of subcontracts exempt from bonding requirements.
3. Offer assistance with regard to bonding requirements and insurance requirements, where applicable, and/or financing (e.g., lines of credit), specifying the type of assistance that the bidder is offering. Assistance may include, but is not limited to the following:
  - a. Contacting bonding and/or insurance companies on behalf of DBEs;
  - b. Arranging with sureties incremental or phased bonding for the DBEs;
  - c. Paying for the cost of the bond or insurance;
  - d. Waiving bond or other requirement;
  - e. Referring DBEs to Business Development Centers or other resource agencies, which may assist DBEs in obtaining bonding, insurance, or lines of credit;
  - f. Offer to make plans and specifications available to DBEs at reasonable hours for viewing, copying, or borrowing and provide a list containing the location

of plan rooms.

4. Each bidder will use the CUCP Database as a source of DBEs for solicitation.

In addition to the mandatory requirement to use the CUCP Database, each bidder is encouraged to use the services of minority, women, and small business community organizations and/or contractors' groups in order to identify potentially certifiable DBEs for work under the contract. A listing of such organizations is available from the District's Office of Civil Rights.

#### **E. Follow-Up of Initial Solicitations**

A bidder will follow up initial solicitations of DBE sub-bids no later than 10 days after the mailing of the initial solicitation letters. The follow-up will be conducted by someone familiar with the project and capable of answering questions from potential DBE subcontractors. If, due to the bidding schedule established by the District, 10 days are not available between the mailing of the solicitations and the bid opening date, follow-up shall occur within a shorter reasonable period of time. Follow up communication may be conducted via email. Such follow-up activity must be documented by telephone logs or other written documentation which provide, at a minimum, the following information:

1. Type of contact, e.g., telephone call, visit, email, letter.
2. Name and position of person who made contact on behalf of the bidder.
3. Name and address and/or email of firm contacted.
4. Name and position of person contacted, telephone number, and date of contact.
5. The response from the firm contacted with regard to its interest in submitting a sub-bid.
6. Email return receipts to document successful delivery to DBE subcontractors and, in the case of returned email correspondence, documentation from the mail server that the email was undeliverable.
7. Follow-up, if any, to the assistance offered in the initial solicitation letter with regard to breakdown of work into economically feasible units, bonding, insurance, lines of credit, and plans and specifications.
8. For each DBE contacted who declined to bid, the reason provided by the DBE for declining to bid. If the reason cited relates to bonding, financing or insurance, the bidder must provide documentation describing in detail the assistance offered by the bidder to the DBE.

#### **F. Responses from Interested DBEs**

Each bidder will submit records of responses, proposals and/or bids received from DBEs, which will include, at a minimum, the following information:

1. Names, positions, addresses and telephone numbers of all DBEs that responded to

the bidder's solicitation.

2. All responses (including requests for assistance or information), proposals, or bids received, and whether such responses, proposals or bids were in writing or verbal. In the case of written responses, copies of such responses.
3. The date each response was received by the bidders.

#### **G. Bidder's Evaluation of Interested DBEs**

Each bidder will submit documentation of its evaluation of proposals or bids received from DBEs. For each DBE that responded to the bidder's solicitation, the bidder will document the following:

1. A summary of all communications and negotiations, if any, between the bidder and the DBE.
2. A description of specific assistance agreed to be provided by the bidder to the DBE with regard to bonding, insurance, and/or obtaining plans and specifications.
3. If the bid was rejected, the reasons for rejection. The District may deem that a bidder has not made good faith efforts if DBE sub-bids have been rejected without adequate reason.
4. If the bid was rejected for any reason, a copy of the DBE's bid along with copies of all bids received by non-DBE firms for the same or similar scope of work.
5. If a DBE was rejected as unqualified, a description of the investigation conducted by the bidder prior to reaching the conclusion that the DBE was unqualified.

#### **H. Other Efforts**

Each bidder will include in the information submitted any other efforts made to meet the DBE goal that are not listed above.

#### **I. Good Faith Efforts Assessment**

In addition to determining whether a bidder has taken the actions described above, the District will consider the following factors in determining whether good faith efforts have been met:

1. A bidder's selection of a potentially certifiable firm instead of a CUCP or District-certified DBE firm is a risk assumed solely by the bidder. If any such firm is determined not to be certifiable and there are District – or CUCP – certified firms available for that work, the bidder's assumption that the firm is certifiable will not be taken into consideration for good faith efforts evaluation, and will not relieve the bidder from complying with good faith efforts requirements.

2. The District will give considerably greater weight to the final decisions made by the bidder to subcontract to DBEs, than to statements in the bidder's solicitation letters indicating its intent to subcontract, or to the number of DBEs contacted.
3. Failure of a bidder to subcontract portions of work that it would otherwise perform itself, or to enter into a joint venture arrangement in order to meet the goal, will be considered adversely if the bidder otherwise cannot reasonably have been expected to meet the goal.

#### **J. Hearing On Good Faith Efforts Determination**

If it appears to the District that the bidder has submitted all DBE documentation in compliance with these good faith efforts requirements, but has neither achieved the indicated percentage of DBE participation nor made sufficient good faith efforts to meet the goal, such bidder will be notified that its bid will be recommended for rejection and the reasons therefore. Within five (5) working days of such telephone and/or facsimile notification, the bidder may request a hearing. Such hearing will be held at the convenience of the District but no later than ten (10) working day after receipt of the request and in accordance with the Office of Civil Rights Hearing Procedures, copies of which are available upon request. Any bidder requesting a good faith efforts hearing is required to send a check for fifteen hundred dollars (\$1,500) to cover their portion of any costs associated with the good faith efforts hearing. All hearings by the District shall be made by an outside independent hearing officer selected in accordance with District procedures. At such hearing, the bidder will bear the burden of demonstrating by preponderance of the evidence:

1. Achievement of the percentage goal for DBE participation as of the date of bid opening, as documented in the bid; or
2. Good faith efforts made prior to bid submission that, given all relevant circumstances, could reasonably have been expected to produce a level of DBE participation which meets the Contract goal.

## **Appendix G: Procedure to Resolve Subcontractor Issues**

This Appendix outlines a procedure by which project staff and the Office of Civil Rights (OCR) will work together to resolve issues that arise between a prime contractor and certain subcontractors.

### **A. Initiation**

A subcontractor that is an MSBE, SBE or DBE (M/S/DBE) that has an unresolved issue with a prime contractor concerning the payment process or any other aspect of its contract work may seek the District's involvement in an effort to resolve the issue. The process begins when a subcontractor submits a written complaint or notification of a dispute to OCR staff's project representative. Copies of all notifications will be provided to the Project Manager (PM) and the Resident Engineer (RE) and the OCR DBE Manager.

### **B. Investigation and Assessment**

Upon receipt of a written notification, OCR staff (with support as needed by the Project) will initiate an investigation. The investigation will include the collection and documentation of any facts relevant to the issue including: conducting interviews and reviewing any documents and records necessary to complete an initial assessment of the issue. Within 10 working days, OCR will determine whether the issue has merit and should be pursued further. If OCR staff determines the issue has no merit, such determination will be issued in writing to the RE, PM, DBE Manager, and the subcontractor involved.

If OCR staff determines there is merit to the issue between the prime contractor and the subcontractor, within 5 working days OCR staff will attend a meeting with the RE to discuss the findings and to attempt to find a means of resolving the dispute. The resolution may include additional meetings with the prime contractor and subcontractor in an attempt to mediate a settlement. If a resolution is agreed, the RE and OCR staff will jointly document the resolution. Issues involving the enforcement of contractual terms or penalties will become the RE's responsibility to administer.

### **C. Alert Notice: PM and OCR DBE Manager**

If the issue is not resolved through the above process, OCR staff and the RE will issue an Alert Notice to the PM and the OCR DBE Manager, including the initial assessment and any information developed in previous attempts to resolve the issue. Within 5 days of receiving the Alert Notice, the PM and the OCR DBE Manager will attend a meeting to discuss the findings and attempt to resolve the issue. If a resolution is agreed, the project and OCR staff will jointly document the resolution. Issues involving the enforcement of contractual terms or penalties will become the RE's responsibility to administer.

### **D. Alert Notice: TSD Group Manager and OCR Department Manager**

If the issue is not resolved, the Alert Notice will be issued to the TSD Group Manager and the Department Manager of OCR documenting the assessment and previous attempts to resolve the issue. At this point an Ombudsperson investigation may be initiated. The Ombudsperson will be jointly selected by the project staff and OCR to conduct an independent investigation intended to provide an impartial assessment of the issue. The Ombudsperson will be authorized to collect and document any facts relevant to the issue



including: conducting interviews and reviewing any records necessary to complete an assessment and a written recommendation. Once the investigation is complete, the Ombudsperson will forward the findings to the Planning, Development, and Construction Group Manager and the Department Manager of OCR. Upon receipt of the Ombudsperson's findings, the PD&C Group Manager and the OCR Department Manager will meet within 5 working days to review the report and the recommendations for resolution. If requested, the Ombudsperson may assist to attempt to mediate a resolution. If a resolution is agreed, the project staff and OCR will jointly document the resolution. Resolutions involving the enforcement of contractual terms or penalties will become the RE's responsibility to administer.

**E. Alert Notice: Assistant General Manager, Planning, Development and Construction and Deputy General Manager**

If the issue is not resolved, the Alert Notice, and the Ombudsperson's report, if any, will be issued to the Assistant General Manager, PD&C and the Deputy General Manager documenting the issue and all previous attempts to resolve the issue. Within 5 days of receiving the notification, Assistant General Manager and Deputy General Manager will meet and agree to a course of action. The Project staff and OCR staff will jointly document the resolution and, if needed, inform the General Manager of the relevant facts of the resolution.

## **Appendix H: Process for Implementing Small Business Elements**

The Small Business Elements of the DBE Program, which are part of the District's race neutral efforts to facilitate competition by small business concerns and to further the District's ability to reach its overall DBE goals, The SB Elements meet the requirements outlined in 49 CFR Section 26.39. Two types of firms are eligible to participate in this program: a) Small Business Entities (SBEs) and b) Micro Small Business Entities (MSBEs). The SB Elements include two components: contract-specific SBE goals and MSBE set-aside contracts. SBE contract goals represent a percentage of the total contract or agreement a prime bidder is expected to subcontract to certified SBE firms. An SBE prime bidder or joint venture partner may be able to fulfill the SBE goal. MSBE set-aside contracts represent specific contracts or agreements for which certified MSBE firms have the exclusive right to bid or propose.

### **A. Eligibility of SB Elements Participants**

Firms or individuals that can demonstrate that they meet the following criteria are eligible to be certified as an SBE and may submit an application for certification as an SBE:

1. A Small Business Concern;
2. The firm is at least 51 percent owned by one or more individuals or, in the case of any publicly owned business, in which at least 51 percent of the stock is owned by one or more individuals whose personal net worth does not exceed \$1.32 million;
3. The firm's management and daily business operations are controlled by one or more of the individuals whose personal net worth is as described in 2. above.

Certification-eligible SBEs, are eligible to be certified, in a single industry classification which is the firm's primary industry classification, as a Micro Small Business Entity (MSBE) if the firm can demonstrate that the individual's or firm's average annual gross receipts (including those of its affiliates) over the previous three fiscal years do not exceed the following caps: i) \$10 million for firms whose primary industry classification is construction; ii) \$6 million for firms whose primary industry classification is professional or other services; or iii) \$6 million for firms whose primary industry classification is the supplier of goods.

Firms certified as a DBE in the State of California by the CUCP or one of its participating agencies are presumptively held to have met the requirements of Appendix H, Paragraph A.1, 2, and 3. above and are certified as an SBE under Appendix H as long as the firm remains eligible as a CUCP certified DBE. These firms are still required to submit an application for certification as an MSBE. A DBE, SBE and MSBE firm must be certified prior to any bid opening or proposal submittal deadline to be considered as a DBE, SBE or MSBE, respectively. If a DBE certified by the CUCP applies for MSBE certification, it is not required to complete the full application for MSBE certification. In order to be certified as an MSBE, such firms certified as a DBE by the CUCP are required to provide:

1. The DBE certification number of their firm;
2. Tax returns for the previous three fiscal years;
3. Any other information as requested by the District needed to verify eligibility as an MSBE.

Additional information may be requested from any applicant for SBE or MSBE certification. Failure to timely provide any information requested by the District shall be grounds for the denial of a firm's certification.

A Bidder or Proposer seeking to qualify to bid on an MSBE set aside contract or agreement with BART, or a firm seeking to be recognized as an MSBE or SBE prime, subcontractor, Subsupplier, or Subconsultant, shall be qualified as an MSBE and SBE respectively under this program and be certified as an MSBE or SBE under this program prior to the Bid opening time or proposal submittal deadline applicable to any bid, contract or agreement that they wish to participate on as a qualifying MSBE or SBE.

## **B. Ownership and Control Requirements**

A firm seeking certification has the burden of demonstrating to the District, by a preponderance of the evidence, that it meets the requirements related to business size, ownership and control. The District will make all determinations of SBE or MSBE eligibility by considering all the facts in the record, viewed as a whole, including the following factors.

1. To be an eligible SBE or MSBE, a firm must be owned and controlled by an individual or individuals who meet the personal net worth requirements of this Appendix H.
2. In the case of a corporation, such individuals must own at least 51% of the aggregate of all stock outstanding. In the case of a partnership, each class of partnership interest must be owned by an individual who meets the requirements of this section which must be reflected in the firm's partnership agreement. In the case of a corporation each class of member interest must be owned by individuals who meet the requirements of this Appendix H.
3. The firm's ownership by individuals meeting the eligibility criteria of this Appendix H must be real, substantial and continuing, going beyond pro forma ownership of the firm as reflected in the ownership documents. The owners should be entitled to the profits and loss commensurate with their ownership interests; and any terms or practices that give a non-disadvantaged individual or firm a priority or superior right to a firm's profits are grounds for denial of certification.
4. All securities that constitute ownership will be held directly by the applicants.
5. The contributions of capital or expertise by applicants to acquire their ownership interests must be real and substantial.
6. In a situation in which an individual's expertise is relied upon as part of a owner's contribution to acquire ownership, the owner's expertise must be: in a specialized field; of outstanding quality; in areas critical to the firm's operations; indispensable to the firm's potential success; specific to the type of work the firm performs; and documented in the records of the firm. The individual whose expertise is relied upon must have a significant financial investment in the firm.
7. For purposes of determining ownership, the District will deem as held by an applicant all interests in a business or other assets obtained by the individual as the result of a final property settlement or court order in a divorce or legal separation and through inheritance or otherwise because of the death of the former owner.
8. The District will presume as not being held by an applicant, for purposes of

determining ownership, all interests in a business or other assets obtained by the individual as the result of a gift, or transfer without adequate consideration, from any one of the following: i) an individual or firm which is involved in the applicant firm; ii) an affiliate of the applicant firm; iii) an individual or firm involved in the same or a similar line of business or engaged in an ongoing business relationship with the applicant firm or iv) an affiliate of the firm described in iii) above.

9. To overcome the foregoing presumption and permit the interests or assets to be counted, the disadvantaged individual must demonstrate by clear and convincing evidence that:
  - a. The gift or transfer was made for reasons other than obtaining certification as a SBE or MSBE and;
  - b. The stated owner(s) actually control the management, policy, and operations of the firm, notwithstanding the continuing participation of the individual(s) who provided the gift or transfer.
10. When marital assets (other than the assets of the business in question), held jointly or as community property by both spouses, are used to acquire the ownership interests asserted by one spouse, the District will deem ownership interest in the firm to have been acquired by that spouse with his/her individual resources, provided that the other spouse irrevocably renounces and transfers all rights in the ownership interest in the manner sanctioned by the laws of the state in which either spouse or the firm is domiciled. The District will not count a greater portion of joint or community property assets toward ownership than state law would recognize as belonging to the socially and economically disadvantaged owner of the firm. A copy of the document legally transferring and renouncing the other spouse's rights in the jointly owned or community assets used to acquire an ownership interest in the firm must be included as part of the firm's application for SBE or MSBE certification.
11. The District may consider the following factors in determining the ownership of a firm, but will not regard a contribution of capital as failing to be real and substantial nor find a firm ineligible, solely because:
  - a. an individual acquired his or her ownership interest as the result of a gift or transfer without adequate consideration other than the types set above;
  - b. there is a provision for the co-signature of a spouse who is not an applicant on financing agreements, contracts for the purchase or sale of real or personal property, bank signature cards, or other documents or ownership of the firm in question; or
  - c. ownership of the firm or the assets thereof is transferred for adequate consideration from a spouse to the applicant. In this case, the District will give particularly close and careful scrutiny to the ownership and control of a firm to ensure that it is owned and controlled, in substance as well as in form, by the applicant(s).
12. Only an independent business may be certified as a SBE or MSBE. An independent

business is one the viability of which does not depend on its relationship with another firm or firms. In determining whether a potential SBE or MSBE is an independent business, the District will scrutinize relationships with other firms in such areas as personnel, facilities, equipment, financial and/or bonding support, and other resources.

13. The District will consider present or recent employer/employee relationships, the firm's relationship with prime contractors, and other similar factors related to the independence of a potential SBE or MSBE firm. Further, the District will consider the consistency of relationships between the potential SBE or MSBE firms and other firms within normal industry practice.
14. An SBE or MSBE firm must not be subject to any formal or informal restrictions which limit the customary discretion of the owners.
15. The owner(s) must possess the power to direct or cause the direction of the management and policies of the firm and to make day-to-day as well as long-term decisions on matters of management, policy and operations. In a corporation, the owners must control the board of directors.
16. The owner(s) must hold the highest officer position in the company (e.g. chief executive officer or president).
17. In a partnership, the owner(s) must serve as general partners with control over all partnership decisions.
18. The managerial role of the owner(s) in the firm's overall affairs must be such that the District can reasonably conclude that the owner(s) actually exercise control over the firm's operations, management and policy.
19. The owner(s) must have an overall understanding of, and managerial and technical competence directly related to, the type of business in which the firm is engaged and the firm's operations.
20. If the state or local law requires the persons to have a particular license or other credential in order to own and/or control a certain type of firm, then the person(s) who owns and controls a potential SBE or MSBE firm of that type must be the qualifying individual for the required license or credential.
21. The District will consider differences in remuneration between the owner(s) and other participants in the firm, in the context of the duties involved, normal industry practices, and the firm's policies and practices.
22. In order to be viewed as controlling the firm, an owner cannot engage in outside employment or other business interests which conflict with the management of the firm or prevent the individual from devoting sufficient time and attention to the affairs of the firm.
23. An owner may control the firm even though one or more of the individual's immediate family members participate in the firm. If the District cannot determine that the socially and economically disadvantaged owners, as distinct from the family as a whole, control the firm, then the socially and economically disadvantaged owners have failed to carry the burden of proof concerning control even though they may participate significantly in the firm's activities.
24. Where a firm was formerly owned and/or controlled by an individual or individuals (whether or not an immediate family member), who do not meet the standards for SBE and/or MSBE certification in Appendix H, and this individual or these individuals remain involved with the firm in any capacity, the individual now

owning the firm must demonstrate by clear and convincing evidence that the transfer of ownership and/or control to the disadvantaged individual was made for reasons other than obtaining certification as a SBE or MSBE and that the individual actually controls the management, policy, and operations of the firm, notwithstanding the continuing participation of any individual who formerly owned and/or controlled the firm.

25. In determining whether a firm is controlled by its owners, the District will consider whether the firm owns equipment necessary to perform its work. The District will grant certification to a firm only for specific types of work in which the owners have the ability to control the firm. To become certified in an additional type of work, the firm must demonstrate only that owners are able to control the firm with respect to that type of work. The District will not require that the firm be recertified or submit a new application for certification but will verify the owner's control of the firm and the additional type of work. Any work for which a firm is certified to perform will be expressed by assigning the most appropriate NAICS code(s) to the firm.
26. Each SBE and/or MSBE firm shall be assigned a primary industry classification expressed as the NAICS code which best describes the primary business of a firm.
27. At the sole discretion of the District, it may conduct site visits to collect information or verify any statements made by an applicant.

### **C. Certification of SBE and MSBE Firms**

A firm seeking certification has the burden of demonstrating to the District, by a preponderance of the evidence, that it meets the requirements related to business size, ownership and control. The District will make all determinations of SBE or MSBE eligibility by considering all the facts in the record, viewed as a whole.

Within ninety (90) days of receiving from the applicant all information required, the District will take all the following steps in determining whether an applicant firm meets the SBE and/or MSBE certification standards:

1. If the firm is a corporation, the District will analyze the ownership of stock in the firm as well as all relevant documents;
2. The District will analyze the bonding and financial capacity of the firm;
3. The District will determine the work history of the firm, including contracts it has received, and work it has completed;
4. The District will obtain or compile a list of equipment owned by or available to the firm and the licenses the firm and its key personnel possess to perform the work it seeks to do as part of the SB Elements;
5. The District will ensure that the applicant firm meets the standards established for personal net worth and business size standards of this program;
6. The District will require potential SBEs to complete and submit an appropriate application form. The District will ensure that the applicant attests to the accuracy and truthfulness of the information on the application form. This will be in the form of an affidavit sworn to by the applicant before a person authorized by state law to administer oaths or in the form of an unsworn declaration executed under penalty of perjury of the laws of the United States. The District will review all information on the form prior to making a decision about the SBE eligibility of the firm;

7. The District will request any additional documentation needed to ensure to verify the eligibility;
8. The District will determine if an on-site visit or phone interview is necessary and schedule an on-site visit or phone interview. The decision to schedule an on-site visit or phone interview is made at the sole discretion of the District.
9. The District will make a determination of eligibility of the firm and issue a certification or a denial of certification to the firm.

If a firm is found to be eligible for SBE or MSBE certification, the District will add that firm to its database of SBE and/or MSBE certified firms. The District will also provide the firm with a certification document for the firm to maintain in its records. This document will contain:

1. The name of the firm;
2. NAICS codes corresponding to the categories of work the firm is certified to perform;
3. The firm's primary industry classification;
4. The name of the owner(s) of the firm.

Should a firm be denied certification for any reason, the District shall notify the firm in writing of the decision. Any certification decisions made by the District for SBE and MSBE certification are administratively final and may not be appealed.

The DBE Liaison Officer will be responsible for maintaining a list of all currently eligible SBEs and MSBEs and ensuring that this list is regularly updated and maintained. Audits will be performed as necessary. Firms are required to notify the District upon their knowledge of any event or action that would disqualify them from participation in the SB Elements including:

1. Changes to the economic status of the owner(s) for example any change that places an individual owner over the \$1.32 million personal net worth cap.
2. Changes in the average annual gross receipts of the firm which would place the firm over the SBA size standard for the specific NAICS code(s) for which the firm is certified to perform work or changes in the average annual gross receipts of the firm which would place the firm over the MSBE gross receipts cap for its category of work.
3. Changes in the ownership structure of the firm which results in less than 51% of the firm being owned by one or more individuals whose personal net worth meets the requirements of Section A.2 of this Appendix H.
4. Any other change in the status of the firm or owner that would disqualify the firm from participation as an SBE or MSBE.

From time to time and at the sole discretion of the District, an SBE or MSBE may be required to file a declaration of no-change. This declaration will be in the form of an affidavit sworn to by the applicant before a person authorized by state law to administer oaths or in the form of an unsworn declaration executed under penalty of perjury of the laws of the United States. Failure to timely provide the declaration of no-change or any information requested by the District related to the declaration of no-change shall be grounds for immediate de-

certification of a firm as an SBE or MSBE.

If, at any time, the District determines an SBE is no longer eligible to participate as an SBE or MSBE the District shall notify the SBE or MSBE in writing, and the District shall remove the SBE or MSBE from its SBE or MSBE database. Effective as of the date of the letter to the firm, that firm shall no longer eligible be to participate as an SBE or MSBE on the District's contracts.

#### **D. Counting SBE Participation**

SBE Participation on contracts will be counted in the following manner:

1. All certified DBEs are presumed to meet the criteria to be certified as SBEs. A DBE that either is located in the BART Market Area or attempted to do business in the BART Market Area within 2 years of the advertisement for a solicitation, will be counted as both an SBE and a DBE for purposes of determining attainment of SBE and/or DBE contracts specific goals or attainment.
2. All DBEs will be counted as race and gender neutral DBE attainment on contracts with no DBE goal.
3. Only SBEs certified at the time of bid, as either SBEs or DBEs, will be counted for the purpose of determining SBE goal attainment. This includes being certified to perform the specific type of work for which the SBE has been listed. This will be determined by comparing the NAICS codes for the work for which the SBE has been listed with the NAICS codes for which the SBE has been certified.
4. All SBEs must perform a commercially useful function in order to receive credit as an SBE.
5. The Liaison Officer will review for accuracy the total dollar value of the work and the percentage of the total contract bid price reported on the Bidder's SBE subcontractor/participation listing and will compare it to the contract-specific goal established for the contract.
6. If the amount of SBE participation does not meet the contract-specific SBE goal, the Liaison Officer will review the good faith efforts documentation submitted by the bidder, as required by the contract specifications. The Liaison Officer will determine whether the bidder has made good faith efforts to meet the contract-specific SBE goal.
7. Any evaluation of a bidder's SBE attainment towards a contract-specific SBE goal shall be performed concurrently with any evaluation of a bidder's attainment of a contract-specific DBE goal.
8. If the Liaison Officer determines that the bidder has not met the contract-specific SBE goal and has not demonstrated good faith efforts, the Liaison Officer will notify the bidder in writing. The notification will explain the basis and include the reasons for the determination, and will inform the bidder of its right to submit further written documentation or to appear before an independent hearing officer prior to the time that a recommendation for award of the contract is presented to the Board of Directors. After the hearing, the District will provide the bidder with a



written decision. The result of the hearing process is not appealable by the bidder. Any bidder requesting a hearing is required to send a check for fifteen hundred dollars (\$1,500) to cover their portion of any costs associated with the good faith efforts hearing. In the event that a bidder on a contract with both DBE or SBE goals fails to attain both of these goals, any hearing requested by the bidder shall be held concurrently to address both deficiencies.

9. A regular dealer, as defined by 49 CFR Part 26.55, shall receive credit for sixty (60) percent of the value of the goods it provides on contracts with SBE goals.
10. A manufacturer, as defined by 49 CFR Part 26.55, shall receive one-hundred (100) percent credit for the value of the goods it provides on contracts with SBE goals.
11. Brokers, packagers and manufacturer's representatives and any other SBE who arranges or expedites transactions, as defined by 49 CFR Part 26.55, shall receive SBE credit only for its commission, fees charged for assistance with the procurement of materials and supplies or fees or transportation charges for the delivery of materials or supplies on contracts with SBE goals.
12. Truckers shall be counted in a manner consistent with 49 CFR Part 26.55.
13. The District may count work performed by a SBE prime contractor or SBE joint venture partner towards the SBE goal.
14. All work performed by lower-tier SBE subcontractors will be credited toward meeting the SBE goal provided that the lower tier subcontractor was listed on the Designation of Subcontractors, DBEs, and SBEs form.
15. Contractor shall file monthly SBE Utilization Reports, and all other requested forms, in the form proscribed by OCR.
16. A final SBE Utilization Report shall be submitted with the project close out change order.

#### **E. Contracts Eligible for the SB Elements**

All federally funded contracts are eligible for consideration as part of the SB Elements. The determination of the SBE goals for a particular contract and/or the selection of a contract as a set-aside will be made by the DBE Liaison Officer in consultation with District staff at the planning stages of all federally funded contracts. The DBE Liaison Officer will take all necessary steps to facilitate SBE participation on federally-funded contracts. This may include recommendations to unbundle contracts to facilitate SBE participation prior to establishing SBE goals or identifying set-aside contracts for MSBEs. Once a contract has been identified as a potential SBE contract it will be the responsibility of the sponsoring department and the DBE Liaison Officer to determine whether the contract will be set aside for MSBEs or whether SBE goals will be set.

#### **F. Setting SBE Goals**

SBE goals will only be established on contracts that have specific subcontracting opportunities identified by the DBE Liaison Officer. The District is not required to establish a contract-specific SBE goal for every prime contract with subcontracting opportunities. Initially, the District will use the Availability and Utilization Study data regarding DBE availability in the market area as a proxy for SBE availability in the market area. This data will then be adjusted based upon the following considerations: the full range of activities in the proposed contract; the availability of SBEs as subcontractors in the types of work involved in the performance of the proposed contract, based on the number of certified SBE firms contained in the District's SBE database; and any other relevant

criteria.

Any SBE goal will be expressed as a percentage of the overall bid or agreement amount for the contract or agreement and will be set forth in the contract specifications. Contracts with an established SBE goal may also be subject to DBE goals, in accordance with the District's DBE program. In the event that a DBE goal and an SBE goal are established on the same contract, the aggregate of the DBE goal and SBE goal cannot exceed the availability of SBEs willing and able to perform the work items in the BART market area.

Each solicitation for which a SBE contract goal has been established will require the bidders to submit the following information:

1. The names and addresses of SBE firms that will participate in the contract;
2. A description of the work that each SBE will perform;
3. The dollar amount of the participation of each SBE firm;
4. Written documentation from the bidder regarding its commitment to use SBE subcontractors (or prime contractors) whose participation the bidder submits to meet a contract goal;
5. Written confirmation from the SBE that it is participating in the contract as provided in the bidder's commitment; and
6. If the SBE contract goal is not met, evidence of good faith efforts to meet the goal

The District will verify all information submitted by a bidder for completeness and accuracy prior to award. The recommendation for award will be based on an evaluation of the criteria set forth below and will be reached in accordance with the District's procedures applicable to specific types of contracting activity. No bidder will be recommended for award unless the bidder has met the contract-specific SBE goal or has made sufficient good faith efforts to do so.

#### **G. Identifying MSBE Set-aside Contracts**

The DBE Liaison Officer will identify contracts that qualify for MSBE set-asides in conjunction with the sponsoring department. Contracts are eligible for inclusion in the MSBE set-aside program if the engineer's estimate, or any other applicable estimate made by District staff, determines that the contract values will not exceed the following:

1. \$3 million for construction contracts
2. \$6 million for professional services contracts
3. \$3 million for procurement and other services contracts.

MSBE set-aside contracts are not eligible for SBE contract goals, although MSBE firms are encouraged to include other MSBE and SBE firms as subcontractors. Additionally, contracts identified as MSBE set-aside contracts are not eligible for DBE participation goals. Accordingly, no SBE or DBE goal will be established for any contract selected as an MSBE set-aside contract. However, any contract awarded to an MSBE who is also a DBE, or any subcontracts awarded to DBEs on an MSBE set-aside contract, will be counted towards the District's overall DBE goal as race and gender neutral DBE attainment, in a manner consistent with FTA regulations.

Brokers, manufacturer's representatives and any other firms who do not qualify as regular dealers are ineligible to participate on MSBE set-aside contracts.

An MSBE's primary industry classification shall determine that firm's eligibility to bid or propose on a contract identified as an MSBE set-aside contract. Notwithstanding any other work the firm may be certified to perform as an MSBE, MSBEs shall only be eligible to propose on MSBE set-aside contracts where the firm's primary industry classification corresponds to the category of work, construction, procurement or professional services to be provided or performed under the set-aside contract. In addition, all MSBE firms must meet all applicable contract, licensing and legal requirements to bid or propose on contracts designated as an MSBE set-aside.

An MSBE prime contractor must self-perform a minimum portion of the Scopes of Work on an MSBE set-aside contract. The minimum percentage will be decided on a contract-by-contract basis.

#### **H. The Contractor's Obligations under the SB Elements**

In contracts and agreements with an SBE subcontracting participation goal, the Contractor shall take all reasonable steps to ensure that its SBE subcontractors or subconsultants are able to successfully perform their subcontract responsibilities.

#### **I. Good Faith Efforts**

Good faith efforts are those that, given all relevant circumstances, a bidder actively and aggressively seeking to meet the SBE goal would make. The bidder must show that it took all necessary and reasonable steps to achieve an SBE goal or other requirement of this part, which, by their scope, intensity, and appropriateness to the objective, could reasonably be expected to obtain sufficient SBE participation, even if they were not fully successful. Only those efforts made prior to Bid opening will be considered for evaluation of good faith efforts. Each bidder is strongly encouraged to attend the pre-bid meeting listed by the District in the invitation to bid. The meeting is intended to cover the SBE program requirements for the Contract, to inform SBEs of subcontracting opportunities, and to provide an opportunity for bidders to meet and/or solicit subcontractors. Regardless of whether a bidder attends the meeting, the bidder assumes responsibility for being informed and complying with the SBE requirements.

In determining whether good faith efforts have been made, the District will consider, on the basis of documentation timely submitted by the bidder, the quality, quantity, and the intensity of the different kinds of efforts that the bidder has made. The efforts employed by the bidder should be those that one could reasonably expect a bidder to take if the bidder were actively and aggressively trying to obtain SBE participation sufficient to meet the SBE contract goal. Mere pro forma efforts are not good faith efforts to meet the SBE contract requirements. Any bidder failing to meet or exceed a SBE goal shall be required to submit all documentation of their good faith efforts within ten (10) working days of the bid or proposal submission deadline.

Only steps taken by the bidder (as opposed to those taken on the bidder's behalf by a third party) will be considered. The steps listed below are reflective of good faith efforts taken by

a bidder actively and aggressively seeking to meet the goal. The steps listed below are reflective of good faith efforts taken by a bidder actively and aggressively seeking to meet the SBE goal.

The District considers each of the listed steps particularly significant in evaluating a bidder's good faith efforts.

1. A bidder's failure to attend the pre-bid meeting will be considered adversely by the District in assessing good faith efforts.
2. It is the responsibility of the bidder to identify potential categories of work where subcontracting opportunities exist on a contract-by-contract basis. Additionally, the bidder must identify appropriate SBE firms who are capable of and certified to perform the categories of work identified in this analysis of subcontracting opportunities. Failure by a bidder to conduct and document this analysis will be considered adversely by the District in assessing good faith efforts. As used herein, "appropriate" refers to those firms who have been certified by the District to perform any category of work to be subcontracted.
3. No fewer than 21 days prior to the bid opening date, a bidder will have in place advertisements soliciting sub-bids on the Contract from SBEs. If, due to the bidding schedule established by the District, 21 days are not available, advertisements for a shorter reasonable period of time are acceptable. Such advertisements will refer only to bids for the District's contract and will specify the categories of work for which subcontracting opportunities exist for the District's contract. The advertisements will be placed in three or more paid daily or weekly trade association newspapers or other trade focus publications or media reasonably expected to reach SBE firms. The advertisements will be in publications or media that can reasonably be expected to reach both women and minority SBE firms that are likely to bid on this Contract.
4. A bidder will solicit sub-bids by mailing registered or certified letters to SBE firms qualified to perform those categories of work which the bidder is willing to subcontract. Solicitation letters will be mailed no fewer than 21 days prior to the bid opening date. If, due to the bidding schedule established by the District, 21 days are not available, a mailing providing a shorter reasonable period of notice is acceptable. The letters will be mailed to no fewer than 10 appropriate certified or SBE firms for each category of work sought to be subcontracted, or to a number of such firms equal to 100% of the SBEs listed for each such category of work in the District's SBE Database, whichever is less.

The letters to certified SBE firms will:

- a. Clearly identify portions of the work, which the bidder is willing to have performed by subcontractors, and offer to break down any portion of the work into economically feasible units in order to facilitate SBE participation.
- b. Identify if there is a bond waiver requirement for subcontractors for this

contract and the specific dollar value of subcontracts exempt from bonding requirements.

- c. Offer assistance with regard to bonding requirements and insurance requirements, where applicable, and/or financing (e.g., lines of credit), specifying the type of assistance that the bidder is offering. Assistance may include, but is not limited to the following:
  - i. Contacting bonding and/or insurance companies on behalf of SBEs.
  - ii. Arranging with sureties incremental or phased bonding for the SBEs.
  - iii. Paying for the cost of the bond or insurance.
  - iv. Waiving bond or other requirements.
  - v. Referring SBEs to Business Development Centers or other resource agencies, which may assist SBEs in obtaining bonding, insurance, or lines of credit.
- d. Offer to make plans and specifications available to SBEs at reasonable hours for viewing, copying, or borrowing and provide a list containing the location of plan rooms.

Each bidder will use the BART SBE Database as a source of SBEs for solicitation. This Database is available on the BART website at [www.bart.gov/ocr](http://www.bart.gov/ocr). In addition to the mandatory requirement to use the BART SBE Database, each bidder is encouraged to use the services of community organizations and/or contractors' groups in order to identify certifiable SBEs for work under the contract, as well as the CUCP DBE database.

- 5. A bidder will follow up initial solicitations of SBE sub-bids no later than 10 days after the mailing of the initial solicitation letters. The follow-up will be conducted by someone familiar with the contract and capable of answering questions from potential SBE subcontractors. If, due to the bidding schedule established by the District, 10 days are not available between the mailing of the solicitations and the bid opening date, follow-up shall occur within a shorter reasonable period of time. Follow up communication may be conducted via email. Such follow-up activity must be documented by telephone logs or other written documentation which provide, at a minimum, the following information:
  - a. Type of contact, e.g., telephone call, visit, email, letter.
  - b. Name and position of person who made contact on behalf of the bidder.
  - c. Name and address and/or email of firm contacted.
  - d. Name and position of person contacted, telephone number, and date of contact.
  - e. The response from the firm contacted with regard to its interest in submitting a sub-bid.
  - f. Email return receipts to document successful delivery to SBE subcontractors and, in the case of returned email correspondence, documentation from the mail server that the email was undeliverable.
  - g. Follow-up, if any, to the assistance offered in the initial solicitation letter with regard to breakdown of work into economically feasible units, bonding, insurance, lines of credit, and plans and specifications.

- h. For each SBE contacted who declined to bid, the reason provided by the SBE for declining to bid. If the reason cited relates to bonding, financing or insurance, the bidder must provide documentation describing in detail the assistance offered by the bidder to the SBE.
- 6. Each bidder will submit records of responses, proposals and/or bids received from SBEs, which will include, at a minimum, the following information:
  - a. Names, positions, addresses and telephone numbers of all SBEs that responded to the bidder's solicitation.
  - b. All responses (including requests for assistance or information), proposals, or bids received, and whether such responses, proposals or bids were in writing or verbal. In the case of written responses, copies of such responses.
  - c. The date each response was received by the bidders.
- 7. Each bidder will submit documentation of its evaluation of proposals or bids received from SBEs. For each SBE that responded to the bidder's solicitation, the bidder will document the following:
  - a. A summary of all communications and negotiations, if any, between the bidder and the SBE.
  - b. A description of specific assistance agreed to be provided by the bidder to the SBE with regard to bonding insurance, and/or obtaining plans and specifications.
  - c. If the bid was rejected, the reasons for rejection. The District may deem that a bidder has not made good faith efforts if SBE sub-bids have been rejected without adequate reason.
  - d. If the bid was rejected for any reason, a copy of the SBE's bid along with copies of all bids received by non-SBE firms for the same or similar scope of work.
  - e. If a SBE was rejected as unqualified, a description of the investigation conducted by the bidder prior to reaching the conclusion that the SBE was unqualified.
- 8. Each bidder will include in the information submitted any other efforts made to meet the SBE goal that are not listed above.
- 9. In addition to determining whether a bidder has taken the actions described above, the District will consider the following factors in determining whether good faith efforts have been met:
  - a. A bidder's selection of a potentially certifiable firm instead of a District-certified SBE firm is a risk assumed solely by the bidder. If any such firm is determined not to be certifiable and there are District certified firms available for that work, the bidder's assumption that the firm is certifiable will not be taken into consideration for good faith efforts evaluation, and will not relieve the bidder from complying with good faith efforts requirements.

- b. The District will give considerably greater weight to the final decisions made by the bidder to subcontract to SBEs, than to statements in the bidder's solicitation letters indicating its intent to subcontract, or to the number of SBEs contacted.
  - c. Failure of a bidder to subcontract portions of work that it would otherwise perform itself, or to enter into a joint venture arrangement in order to meet the goal, will be considered adversely if the bidder otherwise cannot reasonably have been expected to meet the SBE goal.
- 10. If it appears to the District that the bidder has submitted all SBE documentation in compliance with these good faith efforts requirements, but has neither achieved the indicated percentage of SBE participation nor made sufficient good faith efforts to meet the goal, such bidder will be notified that its bid will be recommended for rejection and the reasons therefore. Within five (5) working days of such telephone and/or facsimile notification, the bidder may request a hearing. Such hearing will be held at the convenience of the District but no later than ten (10) working days after receipt of the request and in accordance with the Office of Civil Rights Hearing Procedures, copies of which are available upon request. Any bidder requesting a good faith efforts hearing will be responsible for half of the cost of the hearing. All hearings by the District shall be made by an outside independent hearing officer selected in accordance with District procedures. At such hearing, the bidder will bear the burden of demonstrating by preponderance of the evidence:
  - a. Achievement of the percentage goal for SBE subcontract participation as of the date of bid opening, as documented in the bid; or
  - b. Sufficient Good faith efforts made prior to bid submission that, given all relevant circumstances, could reasonably have been expected to produce a level of SBE subcontract participation which meets the SBE goal.

## **J. Monitoring and Compliance**

The Liaison Officer shall be responsible for establishing monitoring and compliance methods to ensure that the work awarded to SBEs or MSBEs is performed by SBEs or MSBEs, respectively. This program will be consistent with the monitoring and compliance program established for the overall DBE Program. All SBEs and MSBEs must perform a commercially useful function and must be certified to perform the work they have been awarded. Additionally, MSBEs may only perform work consistent with the firm's primary industry classification. Guidelines established for commercially useful function contained in 49 CFR Part 26.55, as it may be amended, will be used to determine if an SBE or MSBE is performing a commercially useful function.

## **K. Termination of SBE Firms**

A contractor must immediately notify the Liaison Officer of an SBE's inability to perform, and must provide documentation to substantiate any claim of non-performance. In order to terminate an SBE, the contractor must receive prior, written approval from the District. Termination of SBEs shall only be for good cause, as determined by the District. Any termination of a SBE must be essential to the prime contractor and may not be discretionary or advantageous. Nothing herein shall limit the ability of the District to terminate an MSBE consistent with the terms of the MSBE's contract or agreement with the District.

The contractor will be required to make good faith efforts to substitute the defaulting SBE subcontractor with another certified SBE. The contractor will be required to provide copies of new or amended subcontracts and a completed SBE certification application form for each firm seeking to be certified as a new SBE.

**L. Failure to adhere to SBE requirements**

The failure of a contractor, supplier, or consultant, or subcontractor, where applicable, to adhere to any of the requirements of the SB Elements shall constitute a material breach of the contract or agreement and may result in BART terminating the contract or agreement or imposing appropriate sanctions. Among other things, BART may withhold payments or portions of payments to the contractor, supplier, or consultant or undertake other enforcement measures due to the failure of the contractor, supplier, or consultant or where applicable, the subcontractors, to comply with the SBE subcontract participation requirements. Such payments withheld will be released once the contractor, supplier, or consultant or its subcontractors, conform to the requirements of the SB Elements.



### Subcontractor Issue Resolution Process

<b>Maximum Duration Days</b>	<b>Action</b>		<b>Project Representative</b>	<b>Office of Civil Rights Rep</b>
10	Assess merit Resolve or send to RE	Subcontractor Notification	Support as needed	OCR Staff
5	Resolve or escalate	Written Assessment by OCR Staff	Resident Engineer	OCR Staff
5	Resolve or escalate If escalation, initiate Ombudsperson Investigation	Alert Notice	Project Manager	DBE Manager
5	Resolve or escalate	Alert Notice & Ombudsperson Investigation & Report	Project Group Manager	Department Manager
5	Resolve – notification to GM	Alert Notice & OMB Report	AGM	DBE Liaison Officer
			General Manager	

Form for Appendix G:

**SAN FRANCISCO BAY AREA RAPID TRANSIT DISTRICT  
Alert Notice**

Office of Civil Rights

Date: \_\_\_\_\_ Notice Number: \_\_\_\_\_ Contract No. \_\_\_\_\_

Prime Contractor: \_\_\_\_\_ M/S/DBE Subcontractor or Supplier: \_\_\_\_\_

Description of Issue (s):

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Parties Involved:                      Name:                      Address:                      Telephone:

Contractor/Subcontractor/Supplier: \_\_\_\_\_

M/S/DBE Subcontractor or Supplier: \_\_\_\_\_

Resident Engineer: \_\_\_\_\_

Project Manager: \_\_\_\_\_

OCR Staff: \_\_\_\_\_

Action Recommended:

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\_\_\_\_\_  
*Project Manager                      Date*

\_\_\_\_\_  
*Office of Civil Rights                      Date*

Follow-up and Case Out:

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## **Appendix I: Mentor-Protégé Program**

A Mentor-Protégé Program implemented by BART is an optional program which, when implemented, will adhere to 49 CFR Part 26.35 and Part 26 Appendix D-Mentor Protégé Program Guidelines. BART's Mentor-Protégé Program (M-P Program) will be separate from any DBE business development plan. The objective of the M-P Program is to build up or enhance the capacity of a Protégé firm through support provided by the Mentor firm. A Protégé firm may be used for up to half of a Mentor firm's DBE goal. The following procedures will be used in implementing the M-P Program.

1. Only firms certified as DBEs, MSBEs, or SBEs before they are proposed for participation in the M-P Program are eligible to participate in the federal portion of the M-P Program.
2. If a DBE Protégé's subcontract is larger than all of its previous or current contracts, the Mentor is only awarded DBE credit for the amount equal to the Protégé's otherwise largest contract.
3. The Mentor-Protégé relationship is based on a written Protégé Development Plan, which sets forth the objectives of the Mentor and Protégé, the length of the relationship, and the resources to be provided. The Protégé Development Plan will be submitted to the District OCR for review and approval.
4. DBEs participating in the M-P Program must continue to be independent business entities, as defined by the certification standards of the DBE Program.